In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1126

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

TRANS WORLD AIRLINES, INC.,
Petitioner,

vs.

LARRY G. HARDISON, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 142 and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 1650,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Trans World Airlines, Inc. ("TWA") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on December 16, 1975.[1]

1. TWA was a co-defendant below with the International Association of Machinists and Aerospace Workers, International Association of Machinists and Aerospace Workers, District 142 and International Association of Machinists and Aerospace Workers, Local 1650. The district court judgment in favor of the unions was upheld by the court of appeals because of Hardison's failure to process an appeal against them (B. p. A46). *Amicus Curiae* briefs were filed in the court of appeals by the Equal Employment Opportunity Commission and the National Jewish Commission on Law and Public Affairs.

OPINIONS BELOW

The opinion of the court of appeals (B. p. A29)[2] is unreported except in 44 U.S.L.W. 2295 (8th Cir., December 16, 1975). The judgment and opinion of the district court (A. p. A1) is reported at 375 F. Supp. 877 (W.D. Mo. 1974). The findings and decision of the Equal Employment Opportunity Commission (EEOC) is unreported (C. p. A52).

JURISDICTION

The judgment of the court of appeals reversing, in part, the judgment of the district court was entered December 16, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The jurisdiction of the district court was based upon 42 U.S.C. § 2000e-5(f) (Tr. App. 229-230).

QUESTIONS PRESENTED

(1) Must an employer under the 1964 Civil Rights Act and the establishment clause of the First Amendment, accord preferential treatment to accommodate an employee's religious practices by (a) depriving, without union consent, more senior employees (who may or may not have any religious beliefs) of their seniority rights under a bona fide collective bargaining agreement that did not lock in any past discrimination and which was completely nondiscriminatory against any religion; or (b) financing

2. Reference to "Tr. App. 66" is the transcript appendix which was filed in the circuit court, as well as filed and certified in this Court. References to "A. p. A.....", "B. p. A.....", "C. p. A.....", and "D. p. A....." are to the appendixes annexed to this petition.

an employee's religious observances through payment of overtime wages to a replacement or depriving other work areas of coverage?

(2) Whether the court of appeals improperly precluded an employer having a large labor force from demonstrating an inability to reasonably accommodate without undue hardship the deviate religious practices of its employees?

(3) Whether irreconcilable conflicts between the decisions of different circuits regarding what constitutes reasonable accommodation without undue hardship should be resolved by this Court?

(4) Whether the court of appeals failed to follow Rule 52(a) of the Federal Rules of Civil Procedure in holding the district court's findings clearly erroneous and in effect trying the matter *de novo*?

CONSTITUTIONAL PROVISION, STATUTE, AND GUIDELINE INVOLVED

The establishment clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion. . . ."

Section 701(j) of the Civil Rights Act of 1964, as amended, provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. 42 U.S.C. § 2000e(j) (1974).

Section 703(a)(1) of the Civil Rights Act of 1964, as amended, provides in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . religion. . . . 42 U.S.C. § 2000e-2(a)(1) (1974).

Section 703 (h) of the Civil Rights Act of 1964, as amended, provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply * * * different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin. * * *" 42 U.S.C. § 2000e-2(h) (1974).

Guideline 1605.1 of the United States Equal Employment Opportunity Commission provides in pertinent part:

> [S]ection 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business.
>
> * * *
>
> [T]he employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable. 29 CFR § 1605.1 (1975).

STATEMENT UNDER RULE 33(2)(b)

This proceeding draws into question the constitutionality of Section 701(j) of the Civil Rights Act of 1964, 78 Stat. 255, as amended by Section 2(7) of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. § 2000e(j) [1974] and Section 703(a)(1) of that Act, 78 Stat. 255, 42 U.S.C. § 2000e-2(a)(1) [1974], Acts of Congress affecting the public interest. Since neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. § 2403 may be applicable.

The United States Court of Appeals for the Eighth Circuit, pursuant to 28 U.S.C. § 2403, on November 21, 1974 certified to the Attorney General the fact that the constitutionality of such sections of the Civil Rights Act of 1964, as amended, might be drawn into question.

STATEMENT OF THE CASE

A. Preliminary Statement. This case presents questions of exceptional importance regarding statutory and administrative requirements of employers to reasonably accommodate the religious needs of employees and the constitutionality of those requirements under the establishment clause of the First Amendment.

The questions presented require resolution in the interest of uniform administration of significant legislation and the determination of constitutional questions of substantial import.[3]

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3. Substantial savings of judicial and private resources can be achieved by review of this case because the decision of the district court had gained wide acceptance prior to the reversal

(Continued on following page)

B. Factual Background. Larry G. Hardison, the plaintiff below, was hired by TWA on June 5, 1967. When hired, Hardison indicated he was willing to work shifts, including weekends. In late September or early October, 1968, he adopted the religion of the Worldwide Church of God which observes its Sabbath from Friday at sunset until Saturday at sunset (Tr. App. 40 and 259).

During the period of time Hardison was employed by TWA, he was a member of the International Association of Machinists and Aerospace Workers and his employment relationship was governed by a collective bargaining agreement made pursuant to the Railway Labor Act, 45 U.S.C. § 151 *et seq.* The agreement contained a seniority provision that controlled the work day assignment for Harison and 15,000 other covered employees (Tr. App. 40).[4]

The district court found that, "The seniority system was not designed with the intention to discriminate against religion nor did it act to lock members of any religion into a pattern wherein their freedom to exercise their religion was limited" and that ". . . it was coincidental

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Footnote Continued—

by the court of appeals. The opinion by the district court (Oliver, J.) has been cited with approval and followed in *Dixon* v. *Omaha Public Power District*, 385 F. Supp. 1382 (D. Neb. 1974); *United States* v. *City of Albuquerque*, 9 EPD 10,182 (D. N. Mex. 1975); *Young* v. *Southwestern Savings & Loan Association*, 509 F.2d 140 (5th Cir. 1975) and *Cook* v. *Mountain States Telephone and Telegraph Company*, 397 F. Supp. 1217 (D. Ariz. 1975).

4. The pertinent seniority provision provided:

> The principle of seniority shall apply in the application of this Agreement in all reductions or increases of force, preference of shift assignments, vacation period selection, in bidding for vacancies on new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement (Tr. App. 412).

The union steward maintains the seniority list and fills job vacancies by reference to that list (Tr. App. 371).

that in plaintiff's case the seniority system acted to compound his problems exercising his relgion." (Tr. App. 238 and 59 and A. pp. A10-A11).

In April, 1968, Hardison was working in TWA's Stores Department on the twilight shift, 3:30 to 11:00 p.m. (Tr. App. 258-259). About that time he began studying the teachings of the Worldwide Church of God. On April 25, 1968, Hardison wrote Everett Kussman, TWA's Manager of Stores Systems, asking for Friday sunset to Saturday sunset off (Tr. App. 380). In response to that request, Kussman (1) agreed to the union seeking to swap days off; (2) to excuse time off on religious holidays if Hardison agreed to work on "Christian" holidays, if requested; and (3) to attempt to find Hardison another job (Tr. App. 45-56 and 398). On May 7, 1968, Burns Prater, a TWA supervisor, wrote Kussman, "I haven't made any headway. His time off and day off requirements are too tough to handle. I understand that no one would swap days off with him" (Tr. App. 46).

In the latter part of September, 1968, Hardison requested and received a conference with Kussman. James Tinder, union steward, was also present (Tr. App. 46). At this meeting, Hardison's requirement for time off on religious holidays was discussed and Kussman agreed that the steward should seek to swap days off, to excuse time off on specific holidays if Hardison agreed to work on regular holidays, and to attempt to find Hardison another job (Tr. App. 239, 272-273 and 373-374).

On October 4, 1968, Hardison again wrote a letter to Kussman informing him that he had worked out his day off requirement by transfer to the 11:00 p.m. to 7:00 a.m. shift, which enabled him to observe his Sabbath,

and renewing his request for specific religious holidays off (Tr. App. 381). In response, Kussman reiterated his offer to permit time off on Hardison's religious holidays whenever possible and requested a list of those holidays (Tr. App. 382). The union had no objection to TWA allowing Hardison such an excuse for his religious holidays (Tr. App. 59). October 20, 1968, Hardison supplied such a list and expressed his gratitude for Kussman's "understanding and cooperation" (Tr. App. 383).

On December 2, 1968, Hardison voluntarily transferred, to suit his own convenience, from Building 1, where he had sufficient seniority to maintain a shift in which he could observe his Sabbath, to Building 2, where he was near the bottom of the seniority list. Hardison knew, being junior in the new department, that he might receive some assignments on his Sabbath.[5] March 7, 1969, the man immediately below Hardison in seniority in Building 2 went on a two week vacation, which resulted in Hardison's initial Saturday work (Tr. App. 41-42 and 260-261 and D. p. A62.[6]

Due to the events described above, Kussman anticipated difficulties and arranged a meeting on March 6,

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5. Hardison testified he knew, in general, that more senior employees preferred not to work weekends (Tr. App. 369) and if he had been allowed to bump out of seniority, either to transfer shifts or bid shifts, it would necessarily mean that an individual who did not share his religious beliefs would be deprived of rights under the collective bargaining agreement (Tr. App. 277, 288).

6. Hardison's problem of not having his Sabbath off in the new building was a permanent problem and not a temporary one. However, the problem became acute by virtue of vacation scheduling. Hardison missed work on March 8 and 15, 1969, because of a vacation of the junior man. He also missed work on March 22, 1969. Thereafter, he transferred to a different shift from which he left work at sunset on Friday, March 29, 1969. The chairman of the Union Grievance Committee testified that Hardison had ". . . a permanent problem, not a temporary one" (Tr. App. 355).

1969, with Hardison and the union steward, Tinder (Tr. App. 268). At that meeting, Kussman offered to accommodate Hardison's religious observance by agreeing to any trade of shifts or change of sections that Hardison and the union could work out (Tr. App. 261-264, 268-269, 300-301, 371-372, 374-376). Tinder, the union steward, was amenable to working out Hardison's problem on any of the above bases, subject, however, to the seniority provisions of the collective bargaining agreement. On that date, there were no jobs open for bid nor did Hardison have sufficient seniority to bid on any other job (Tr. App. 284). Any shift or change was impossible within the seniority framework and, despite the consent of TWA, the union was not willing to violate the seniority provisions set out in the contract in order to make changes for Hardison (Tr. App. 269, 302 and 354). The seniority provisions, therefore, precluded the possibility of Hardison's changing his job (Tr. App. 240). TWA was unwilling to permit Hardison to work only four days a week because that would deprive it of work coverage on a day that it needed a man to work (Tr. App. 302 and 322-323).

Hardison was the only person in his job on his shift during the weekends (Tr. App. 267 and 299). To leave that position empty would have impaired the supplying of parts for essential airline operations (Tr. App. 299-300 and 325-326). Had TWA simply granted Hardison days off on his Sabbath, it would have been short of help in the Stores Department of its overhaul facilities at Kansas City International Airport (KCI) (Tr. App. 298, 302). That department is responsible for housing, retaining, and making available parts for use by TWA at its overhaul base and throughout its system (Tr. App. 40-41, 290, 325-326). The department is also obligated to supply airline needs in the event of an emergency (Tr. App. 290).

It operates on a twenty-four-hour-per-day, seven-days-a-week basis (Tr. App. 290). The work in that area would have been greatly imperiled (Tr. App. 319) and flights could be delayed (Tr. App. 336-338) if the department is not properly manned. To fill Hardison's position with supervisory personnel or someone from another area would deprive that area of its regular manpower (Tr. App. 299-300, 318, 326-327, 338). To bring in a man not working on that day or to possibly hold a man over from another shift would force TWA to pay overtime wages (Tr. App. 300, 318-319). Moreover, under the collective bargaining agreement the overtime, in such circumstances, could not be compulsory and TWA might not be able to get it (Tr. App. 302).

Had TWA forced another employee to trade shifts or jobs with plaintiff, such action would have violated the seniority provisions of the labor management contract and TWA would have been subjected to personnel problems and grievances (Tr. App. 276-277, 288, 327, 330-332, 336). TWA did, however, authorize the union steward to contact employees concerning a swap and it was his function to do so (Tr. App. 293, 301, 302, 313). The union, however, would not violate the seniority provision (Tr. App. 354). The employees represented by the unions involved in this case take seniority as a very serious and important contractual right (Tr. App. 339) and uniform application of the seniority principles is important (Tr. App. 330). Indeed, Hardison testified that some union members regard their seniority rights as preciously as he regarded his religious beliefs (Tr. App. 379).

TWA had reduced, or minimal, work forces on the weekends (Tr. App. 294-295) and employees with high seniority generally preferred not to work weekends (Tr. App. 369). The Saturday work force on Hardison's location

consisted of some 38 to 40 people but, as noted above, Hardison was the only person performing his job. Normally, some 200 employees could perform plaintiff's job but they were not available at the mere whim of TWA because of the reduced weekend staff and seniority rights. In regard to the difficulties of merely switching employees from shift to shift or job to job, Kussman testified that, since TWA did not have complete versatility due to the union agreement or security provision, ". . . it isn't just like saying from here to here." Mr. Kussman had the opinion that, even assuming no such restriction, as the number of instances that require exceptions and special provisions increase, the difficulty of working out such arrangements would also increase (Tr. App. 316).

Hardison was absent from his scheduled work on March 8, 15 and 22, 1969. Prior to a scheduled discharge hearing, Hardison changed to a twilight shift, which permitted him a day off on Saturdays. The local union believed, at that time, that its problems were solved (Tr. App. 347). However, on Friday, March 28, 1969, Hardison quit work at sundown. It was immediately apparent to the union that it could not argue that Hardison should not be discharged on the ground that his conflict had been resolved (Tr. App. 347). According to the chairman of the local Union Grievance Committee, Hardison had a ". . . permanent problem, not a temporary one" (Tr. App. 355).

A discharge hearing was held pursuant to the collective bargaining agreement resulting in Hardison's discharge on April 2, 1969 (Tr. App. 52).

After his discharge, Hardison failed to cooperate with the efforts of the union to process an appeal from the discharge hearing (Tr. App. 242, 352 and 357-362).

No defendant below made any statements impugning or expressing animus against Hardison's religious beliefs (Tr. App. 59). Mr. Kussman testified that he, ". . . respected the man's religious convictions and I do today."

C. Proceedings Below. After a full evidentiary hearing, the district court observed that it was, ". . . impressed with the men who were on the line handling the problem" (D. p. A64). The district court concluded that TWA established as a matter of fact that it took appropriate action to accommodate as required by Title VII and that it held several meetings, including a meeting it initiated, with Hardison in an attempt to find a solution. It did accommodate Hardison's observance of special religious holidays and authorized the union steward to search for someone who would swap shifts. Moreover, TWA would not have been placed in a position where it could not work out Hardison's problems had he not transferred, to suit his own convenience, to a shift where he knew he had insufficient seniority to bid a shift compatible with his Sabbath observance.[7] TWA could not simply let plaintiff have the time off and replace him since other work areas would be deprived of coverage and substitute employees for Hardison would be paid at overtime rates.[8]

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7. Hardison's supposed reason in so transferring was because he had recently married. Hardison was later divorced by his wife for grounds of non-support (D. pp. A62-A63). Hardison did not contest the divorce on that ground even though his Bible permitted divorce only for fornication (D. p. A63).

8. The district court, it its opinion, referred to Edwards and Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 Mich. L. Rev. 599, 628 (1971). The authors expressed concern that the duty to accommodate placed an intolerable burden on the employer. The district court stated that: "They described the burden of proving the absence of undue hardship as 'nearly impossible to demonstrate if the work force is large enough. . .' They rightly argue that such an interpretation imposes a priority of the religious over the secular in that it

(Continued on following page)

Notwithstanding the district court's firsthand observation of the witnesses' credibility, the court of appeals, after having the matter under advisement for 53 weeks, reversed. For the court, Judge Webster cited Matthew 27:24 and cast TWA in the role of "Pontius Pilate" (B. p. A37). He disagreed with the findings of fact by the district court and, essentially because of TWA's size, concluded: that Hardison had fully cooperated despite his voluntary shift transfer and failure to assist the union; that TWA could have permitted Hardison to work a four-day week despite being left shorthanded during one of its shifts or else having a supervisor or other worker transferred thereby causing work functions in other areas to suffer; that TWA could have violated the seniority provisions of the collective bargaining agreement despite no union consent being given; and that TWA could have incurred the additional expense of securing an overtime replacement.[9]

Footnote Continued—

might require an employer to favor employees whose religious beliefs require them to follow different schedules than the regular over other employees, even to the point of violating the other employees' bargained for rights" (citation omitted) (Tr. App. 235 and A. pp. A7-A8). The district court concluded that any other decision would raise constitutional questions (A. p. A9). The court of appeals, on the other hand, distinguished each case relied upon by TWA merely because of TWA's size (B. p. A10).

9. The court of appeals asserted that neither Hardison nor his religion would have benefited from such an accommodation; however, the district court sustained an objection to a question as to whether Hardison had agreed to share any recovery in this lawsuit with his religion (D. pp. A63-A64). It is, though, apparent that no other employee would have had a 4-day work week and no other religion would be able to require an employer to incur extra costs so that church members could supposedly attend church and make regular contributions.

REASONS FOR GRANTING THE WRIT

I. The Interpretation of the Statute and Guideline by the Court of Appeals Results in Innumerable Recurrent Nationwide Problems in the Administration of Uniform Work Rules in Collective Bargaining Agreements.

The decision of the court of appeals, far from enhancing less discrimination in employment, will require the employer and union to shift employees out of seniority and dispossess them of the protection of other uniform work rules to accommodate deviate religious beliefs. The court rendered the language of 42 U.S.C. § 2000e-2(h) that protects a, ". . . bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of . . . religion. . . ." meaningless surplusage. The court of appeals decision also erroneously establishes a standard of discrimination by effect despite the fact that the seniority agreement was not designed to lock in past discrimination. Under such circumstances, discrimination by effect is too onerous a standard, particularly in the subjective field of religious beliefs.

Many industries operate under collective bargaining agreements pursuant to important federal statutory schemes such as the Railway Labor Act (45 U.S.C. § 151, *et seq.*) and the National Labor Relations Act (29 U.S.C. § 151, *et seq.*). Those collective bargaining agreements cover thousands of employees. To require an employer, like TWA, to accommodate the various religious idiosyncracies of its thousands of employees would pose insurmountable problems in the performance of its seven-days-a-week airline operations. Those problems are magnified

to crisis proportion when employers are required to violate bona fide and completely nondiscriminatory seniority principles or other uniform work rules of collective bargaining agreements to accommodate the varying religious needs of thousands of employees. Furthermore, depriving a more senior employee of hard earned seniority rights or other uniform work rules is counterproductive to cardinal provisions of the Railway Labor Act and the National Labor Relations Act.

Accommodation of employee religious beliefs frequently simply cannot be made without disruption of work schedules and creation of inequitable or unfair preferential personnel practices. Many industries, like TWA, are engaged in continuous process operations. Shift stability and other uniform work rules are essential to avoid slowdowns, backups, wasted manpower and material, and, in TWA's case, to maintain airline schedules for the benefit of the public. Such industries, like TWA, operate twenty-four-hours-per-day, seven-days-a-week and 365 days each year. The court's speculation that TWA could simply permit a 4-day work week flies in the face of common sense, which tells us that the availability of full-time workers is required to insure proper and efficient work scheduling and coverage in complex industrial systems.

The court of appeals places the employer in an intolerable position. If he is a large employer, it is virtually impossible to prove an undue hardship. The employer must grant employees with deviate religious needs special privileges by requiring other employees (who may not even have any religious beliefs) to forego legitimate seniority rights. Additionally, the employer must incur grievances, morale and work scheduling problems and the extra cost of overtime replacements while the deviate employee is supposedly worshiping.

The court of appeals reached a result contrary to the district court solely by speculating that an employer with a large labor force can always accommodate the diverse religious needs of its employees without undue hardships. This unreasoned and unfounded speculation should not be the basis for permitting a finding of religious discrimination, particularly in the presence of TWA's efforts to accommodate Hardison and the absence of any discriminatory intent. The court of appeals, however, equates discrimination with inability to accommodate thereby greatly insuring the demise of all uniform work rules. That decision, based largely upon TWA's size, will preclude a contrary result in few other cases. The decision, therefore, is one of great importance in the religious discrimination area of Title VII because of its obvious impact upon all uniform work rules. Illustrative of the many other uniform work rules which the large employer and unions will find impossible to justify will be the payment of union dues or union shop agreements. See, for example, *Yott* v. *North American Rockwell*, 501 F.2d 398 (9th Cir. 1974). See also the dissent of Judge Celebrezze in *Cummins* v. *Parker Seal Company*, 516 F.2d 544 (6th Cir. 1975), petition for certiorari filed, 44 L.W. 3207 (U.S. Sept. 25, 1975) (No. 75-478).

When can an employer violate a bona fide nondiscriminatory seniority provision without incurring either liability for breach of agreements, union grievances, strikes or the embitterment of more senior employees who must forego such rights when they may not even have any religious beliefs? When can or must a union not process a grievance for violation of seniority provisions to satisfy the religious idiosyncracies of one of its members? How few employees may an employer have before he can be excused from accommodating a Moslem who wishes

to pray at various times throughout the day? How few baggage handlers or cargo loaders must TWA have before it can not accommodate employees whose religion prevented them from participating in the loading of liquor onto airplanes? Such questions are illustrative of the pervasiveness of the recurring problems engendered by the court of appeals decision which can only be finally resolved by this Court.

II. The Statute and Guideline Violate the Establishment Clause.

The importance and substantial character of the constitutional issues presented were recognized by both the district court and the court of appeals.[10] Indeed, the existence of "grave constitutional questions" was raised in the first key case concerning accommodation of an employee's religious beliefs. *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, 334 (6th Cir. 1970), *aff'd* by an equally divided court, 402 U.S. 689 (1971). Distinguished legal scholars have also asserted that a construction of Title VII of the Civil Rights Act in the circumstances presented by this petition would constitute a violation of the establishment

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10. The district court (Oliver, J.) stated that ". . . this Court is fully cognizant of the fact that the importance of the legal question presented is such that action taken by this Court and necessarily having to decide the question presented obviously will be appealed . . . first to the Court of Appeals and finally to the Supreme Court of the land, because I know of no case that presents the issue quite as sharply . . ." and that this ". . . is an ideal case to test the basic legal questions presented and that they are on their way to the Court of Appeals and eventually to the Supreme Court of the United States (D. p. A64). Similarly, the court of appeals stated that the appeal presented "important questions" for its review (B. p. A29); that the proper relationship between a bona fide seniority system and the requirement of reasonable accommodation had "not yet been settled by the Supreme Court" (B. pp. A42-A43) and that TWA's constitutional arguments were not "without articulate support" (B. p. A47).

clause of the First Amendment. See Edwards and Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 Mich. L. Rev. 599, 628 (1971). Recently, in *Cummins* v. *Parker Seal Company*, *supra*, Judge Celebrezze dissented asserting that the religious accommodation requirement was a violation of the establishment clause. Significantly, a current law review note on recent developments in 44 Fordham L. Review 442 (1975) questions the approach of the two-judge majority in *Cummins* and supports the rationale of Judge Celebrezze's dissent. See also *Reid* v. *Memphis Publishing Co.*, 521 F.2d 512, 524 n.1 (6th Cir., 1975).

Judge Celebrezze's challenging dissent identifies the danger inherent in the court of appeals decision. If Congress is permitted to breach the First Amendment by granting benefits to religion, it is thereby empowered to breach it to take away religious freedoms. The same fear was eloquently expressed by a great religious constitutional scholar, the late Paul G. Kauper, in 18 Mich. Law. Quad. Notes No. 2, p. 17, 1974, "In our pluralistic society with its diverse religious elements no single religion can claim for itself a favored position in the law, and the law in turn may not reflect the views of a single religious community."

Application of the three-part test set forth in *Committee for Public Education and Religious Education and Religious Liberty* v. *Nyquist*, 413 U.S. 757 (1973), requires a finding that Title VII, as construed by the court of appeals, is violative of the establishment clause.

First, the statute and guideline lack a primary "secular legislative purpose". The legislative history of the 1972 amendment contains no suggestion that religious discrimination in employment was a problem requiring remedial legislation.[11] Rather, the purpose, as explained by its sponsor, Senator Randolph, was admittedly to stem the "dwindling of the membership of some religious organizations" which prohibit Saturday labor and because of a "possible inability of employers on some occasions to adjust work schedules to fit the requirements of the faith of some of their workers." 118 Cong. Rec. 705 (1972). Thus, the 1972 amendment and EEOC regulation were explicitly designed to benefit members of particular religious groups without regard to employers' normal work schedules or the rights of other employees who may not believe in that religion or who have no religious beliefs. The statutory purpose to foster religion could not be clearer.

Second, the statute and guideline have the direct and immediate effect of advancing religion. The law unquestionably requires an employer to discriminate in favor of individual employees on the basis of their religious beliefs. Indeed, as construed by the court of appeals, it requires an employer solely because of an empioyee's religious beliefs to incur overtime charges for replacement

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11. There was at best sparse evidence of religious (as opposed to racial) discrimination before Congress when it passed the 1964 Civil Rights Act. According to Congressman Celler, Chairman of the House Judiciary Committee:

> We did not have very much testimony of discrimination on the grounds of religion. You will notice in one of the titles, religion is left out. . . .
>
> We had very little evidence—I do not think we had any of it insofar as the Committee on the Judiciary is concerned that any particular sect or religion had been discriminated against. 110 Cong. Rec. 1528-29 (1964).

Senator Randolph specifically mentioned the Orthodox Jews, the Seventh-day Adventists, and the denomination to which he himself belonged, the Seventh-day Baptists. In this connection he stated:

> My own pastor in this area, Rev. Delmar Van Horn, has expressed his concern and distress that there are certain faiths that are having a very difficult time, especially with the younger people. . . . 118 Cong. Rec. 705 (1972).

employees, reduce the work coverage of other areas, or violate, without union consent, a bona fide and nondiscriminatory seniority provision. Thus, governmental sanction is placed upon the practice of facilitating and encouraging employees to require time off for religious observances so that employees with religious beliefs are aided as against nonbelievers. There simply is no evidence that the law is "evenhanded in operation" or "neutral in primary impact". *Gillette* v. *United States*, 401 U.S. 437, 450 (1971).

To meet the requirement of a clearly secular purpose, the law must be neutral as it affects believers and nonbelievers as well as neutral in intent and effect. *Everson* v. *Board of Education*, 330 U.S. 1, 15 (1947); *Committee for Public Education & Religious Liberty, supra;* and *Torasco* v. *Watkins*, 367 U.S. 488, 495 (1961). In application, the 1972 amendment and guideline require nonbelieving employees to bear the burden, inconvenience and expense of the deviate religious practices of others.[12] Thus, as construed by the court of appeals, the law is not neutral in either intent or effect.

While there is no need to reach the third part of the test, the statute and guideline patently require pervasive and excessive government entanglement with religion. The law requires a court to make a determination as to the sincerity and depth of the employee's beliefs.[13] The court must then evaluate the employer's efforts to accommodate which undoubtedly involves courts in a most

12. In criticizing the thrust and impact of the EEOC's regulations, Edwards and Kaplan present compelling hypotheticals and arguments undercutting the constitutional framework for both the regulation and the statute as later amended. See page 628 of their above-noted article. The authors criticize the EEOC guidelines, *inter alia*, because they appear to be premised on a fundamentally distorted conception of the proper place of religion in a secular society.

13. See 44 Fordham L. Rev. 442, 449, n.61 (1975).

subjective area. Moreover, the EEOC has promulgated extensive, and oftentimes contradictory, guidelines governing what an employer must do under the law. *Yott, supra* at page 399. Those guidelines affect the employer, the accommodated employee and all other employees. The government is thus inextricably involved in serious practical problems for employers, employees and labor organizations in the scheduling of work assignments and the application of other uniform work rules so as not to conflict with the large variety of existing religious practices.

The court of appeals relied upon *Gillette* v. *United States, supra; Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971); and *McGowan* v. *Maryland*, 366 U.S. 420 (1961). The court's reliance on such cases is misplaced. *Gillette* involved a criminal prosecution in which this Court rejected a claim that an exemption from service was available to persons conscientiously opposed to participation in war in any form.[14]

Griggs also is not controlling here because it dealt with the special and unique area of racial discrimination which, as the district court noted, caused a significant "judicial gloss" to be placed on that decision. To rely on *Griggs* would, in essence, require findings of religious discrimination in the subjective area of religious beliefs whereas one's race is clearly not the result of a subjective decision. Nor does the establishment clause have any relationship to racial discrimination. *Griggs* was simply never meant to require a finding of religious discrimination respecting an admittedly bona fide seniority agreement that was not intended to discriminate against any religion and which did not lock in past discrimination. See 42 U.S.C.

14. The two-judge majority in *Cummins* v. *Parker Seal Company* also relied on *Gillette*. That reliance was questioned in 44 Fordham L. Rev. 442, 449 (1975) and by Judge Celebrezze's dissent.

§ 2000e-2(h). Similarly, the Sunday closing cases are not apt as they are altogether different because of the existence of the secular purpose to set aside a uniform day of rest and recreation.[15]

Title VII, as misconceived by the court of appeals, completely overlooks the teaching of Learned Hand in *Otten* v. *Baltimore & O.R.R.*, 205 F.2d 58, 61 (2d Cir. 1953) wherein the importance of proper deference to the need for an individual to also accommodate and compromise his religious beliefs was cogently stated:

> The First Amendment protects one against action by the government . . . but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessity. . . . We must accommodate our idiosyncracies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations for a better world.

III. The Decision of the Court of Appeals Conflicts With the Decisions of Other Courts of Appeal As to the Determination of Whether a Reasonable Accommodation Without Undue Hardship Is Possible.

The court of appeals, in reversing the district court, reached a decision that admittedly is in direct conflict

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15. Any applicability of the Sunday closing laws would seemingly support TWA's position because such cases clearly required many persons to compromise or adjust their individual religious practices to the realities of "communal life" just as Hardison could have done by not transferring to the shift where he knew he would have difficulties in observing his Sabbath.

with the ruling of the Court of Appeals for the Sixth Circuit in *Reid* v. *Memphis Publishing Co., supra.* See note 5 of the court of appeals decision (B. p. A37). In *Reid*, the defendant newspaper declined to hire the plaintiff, as a copyreader, because for religious purposes he refused to work on Saturdays. The only significant differences between this case and *Reid* are that (1) unlike TWA, the defendant employer in *Reid*, "made no effort whatsoever to accommodate *plaintiff Reid's religious beliefs.*" Id. at 523 (Edwards, J. dissenting [emphasis in original]); and (2) the employer in *Reid* did not have to violate a bona fide nondiscriminatory seniority agreement to accommodate the plaintiff. The district court granted judgment to Reid. The court of appeals reversed, concluding that the difficulties feared—but never experienced—by the employer amounted to "undue hardship" within the meaning of Title VII.

The court of appeals decision is also in irreconcilable conflict with the decisions of the Fourth and Fifth Circuit Courts of Appeal in *Johnson* v. *U. S. Postal Service*, 364 F. Supp. 37, *aff'd* 497 F.2d 128 (5th Cir. 1974), and *Roberts* v. *Hermitage Cotton Mills*, 8 F.E.P. 315 (D.C. S.C. 1973), *aff'd* 8 F.E.P. 319 (4th Cir. 1974). Both cases concerned Saturday work for members of the Worldwide Church of God just as in this case. In both cases, the courts upheld the employer, in large part, because the employer had a need for Saturday work and to accommodate would have required forcing more senior employees to replace the accommodated employee. However, in neither case was there any evidence of the existence of a bona fide nondiscriminatory collective bargaining agreement as presented in this petition. Nor is there evidence in either case that the employers endeavored to accommo-

date the work problem as long and thoroughly as TWA did. Despite its efforts to accommodate, TWA is found guilty of religious discrimination while the employers in *Johnson* and *Roberts* escape liability.[16]

Thus, TWA, which strived for accommodation for over six months and which actually accommodated Hardison on both his religious holidays and Sabbath until he voluntarily transferred to a shift in which he knew he would have difficulties, is held to be guilty of religious discrimination even though it would have violated bona fide seniority rights of other employees and incurred overtime wages for a replacement to make further accommodation. The employers in *Reid*, *Johnson* and *Roberts*, on the other hand, who made no efforts to accommodate in less difficult factual settings, escape liability. The only discernible difference in the decisions is the makeup of the different courts which heard the cases. That irreconcilable divergence of views among the courts of appeal mandates this Court's corrective action to achieve consistent administration of the statute.

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16. TWA recognizes that this Court is mainly concerned with conflicts between the circuit courts of appeal; however, the decision below is also in admitted conflict with the opinion in *Dawson* v. *Mizell*, 325 F. Supp. 511 (E.D. Va. 1971) (Merhige, J.). The facts of *Dawson* are, in essence, undistinguishable from this petition including the existence of a seniority provision preventing accommodation. Judge Merhige agreed that the employee could have simply been granted a Saturday off for his religious purposes without really affecting the operation of the Post Office, but the court refused to overlook the fact that, like here, thousands of other employees were governed by the collective bargaining agreement which would have been violated. There was also evidence that the employees, as TWA's employees, considered seniority rights to be of utmost importance. The only distinguishing feature of that case to this petition is that the employer in *Dawson* escaped liability because the court refused to equate religious discrimination with an inability to accommodate.

IV. The Court of Appeals Created a De Novo Review at the Appellate Level in Cases Pertaining to Religious Discrimination in Derogation of Rule 52(a) of the Federal Rules of Civil Procedure Thereby Requiring the Exercise of This Court's Supervisory Powers to Avoid Recurrent Problems.

While this Court only infrequently hears matters involving the "clearly erroneous" provision of Rule 52(a) of the Federal Rules of Civil Procedure, nevertheless, special and important reasons for the granting of certiorari are presented in this case because of the apparent trend among courts of appeal in religious discrimination cases under Title VII to substitute new findings of fact for those of the district court.[17]

The danger of countenancing *de novo* trial on appeal was recognized by Judge Engel in his recent dissent in the religious discrimination case of *Draper* v. *U. S. Pipe & Foundry Co.*, 44 U.S.L.W. 2295 (6th Cir., December 12, 1975), 11 F.E.P. 1106, 1113 (6th Cir. 1975):[18]

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17. The following eight decisions involve reversals of district court findings and opinions in the religious discrimination area. *Dewey* v. *Reynolds Metals Company*, 429 F.2d 324 (6th Cir. 1970); *Riley* v. *Bendix Corporation*, 464 F.2d 1113 (5th Cir. 1972); *Reid* v. *Memphis Publishing Company*, 468 F.2d 346 (6th Cir. 1972); *Young* v. *Southwestern Savings & Loan*, 509 F.2d 140 (5th Cir. 1975); *Cummins* v. *Parker Seal Company*, 516 F.2d 544 (6th Cir. 1975); *Reid* v. *Memphis Publishing Company*, 521 F.2d 512 (6th Cir. 1975); *Draper* v. *U. S. Pipe & Foundry*, ... F.2d ..... (6th Cir. 1975); and *Hardison* v. *Trans World Airlines, Inc.*, ... F.2d ..... (8th Cir. 1975). But in *Johnson*, *supra*, and *Roberts*, *supra*, district court findings were held not to be clearly erroneous. The latter two cases held for the employer and are factually similar to this case.

18. *Draper* is apparently the most recent of the widely differing Sixth Circuit opinions concerning Title VII religious discrimination cases. The court reversed the district court and held for the employee upon the supposed basis of clearly erroneous findings by the district court. Judge Engel strongly dissented by setting forth the district judges' findings of fact which

(Continued on following page)

"Finally, I am unable to veil a growing concern on my part that those who read our majority decision here and in Reid and Cummins may conclude that in this area of law our circuit in effect has instituted a practice of de novo review at the appellate level.

The area of accommodation to religious beliefs is a new and sensitive one. Nevertheless, I hope that we can ultimately approach it in a way which is more consistent with the essentially different roles of the trial and appellate courts."

The wide disparity in the approach of the district court and the court of appeals is demonstrated in their respective views of TWA's efforts to accommodate. The district court observed ". . . I again make the observation that I was impressed with the men who were on the line handling the problem." (D. p. A64) The court of appeals, on the other hand, relegated TWA the role of a "Pontius Pilate" (B. p. A37).

There is no justification for the court of appeals ignoring the district court's findings and retrying the case on the written record, giving no weight to the great advantage Judge Oliver had in seeing, hearing and judging the credibility of the witnesses. The opinion by the court of appeals leads the reader to believe that TWA did nothing

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Footnote Continued—

discussed the factual concern of the two-judge majority. He found it a "surprise" that the findings could be deemed clearly erroneous and stated: "What makes the district court's findings here so especially entitled to credit is the fact that there is absolutely no suggestion of religious bias or prejudice in the record. Draper was a valued and greatly needed employee who enjoyed a close friendship with the man who finally discharged him. These additional circumstances strongly support a finding that the company was willing to and did undergo considerable hardship in order to retain him. This is not a case where Draper's discharge was pretextual, masking a latent bias against his faith or against him for adhering to it." (11 F.E.P. 1106, 1112-13).

to accommodate when, in fact, it did much. The court of appeals mistakenly found that there were 200 other employees available to substitute for plaintiff on the mere whim of TWA when, in fact, TWA had a greatly reduced work force of only 38 to 40 people in the entire job area on weekends and its employees preferred not to work on weekends. Moreover, Hardison was the only person performing his job on the weekends and the seniority provisions would require depriving other employees of their rights if a swap was arranged. TWA did authorize the union steward to contact all employees and it was his function to do so (Tr. App. 293, 301, 302, 313). The court of appeals also erroneously stated that Hardison was only required to work on his Sabbath for a temporary time.[19] Similarly, the court compounds its mistaken view of the facts by asserting that the additional cost to TWA to accommodate Hardison was not clear from the record.

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19. Hardison's problem was permanent and did not lessen when the junior man returned from vacation. Illustratively, Hardison's charge of employment discrimination recited that he was scheduled to work on his Sabbath when Wyatt left only for a two week vacation (D. p. A61). Hardison's own counsel elicited the testimony that Hardison was to replace Wyatt only on March 8 and March 15 (D. p. A61). Hardison did not report to work as scheduled on the next Saturday, March 22. Further, Hardison transferred to a twilight shift from which he left work after sundown on Friday, March 28, 1969. *A fortiori* if his problem was only because of the two week vacation, Hardison would not have transferred shifts. There was no doubt in the union's mind that Hardison simply was never going to work on a Saturday and that he had a "permanent problem, not a temporary problem" (Tr. App. 346, 355).

The district court made the following explicit finding:

After the meeting, but before the discharge hearing, Plaintiff changed his shift to the twilight shift, which permitted him to have Saturdays off. The testimony was that the union believed at this time that its problems were solved (Tr. 391). But on March 28, 1969, Plaintiff quit work at sundown and it became immediately apparent that the union would not be able to argue that Plaintiff should not be dismissed because his conflicts had been resolved (Tr. 391-392).

In reaching that conclusion, the court ignored the stipulation of the parties that set forth the hourly rate of employees (Tr. App. 79). The evidence that a shift consisted of some 8 hours and that replacement time for Hardison would range from time and one-half to double time was undisputed (Tr. App. 85, 300). The cost to TWA could not have been more explicit. Significantly, nowhere in Hardison's suggested findings of fact was it argued that his problem was a mere temporary one or that the cost which TWA would incur to accommodate was not determinable from the record (Tr. App. 82-112).

This Court should exercise its supervisory powers to insure that Rule 52(a) is respected so that future litigants will be afforded the application of the clearly erroneous rule in the sensitive matters presented in Title VII religious discrimination cases. The essentially different roles of the trial and appellate courts must be respected.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully submits that this petition should be granted, and a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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February 6, 1976

APPENDIX

APPENDIX A

Larry G. HARDISON, Plaintiff,

v.

TRANS WORLD AIRLINES et al.,
Defendants.

No. 20096-1.

United States District Court,
W. D. Missouri, W. D.
May 15, 1974.

MEMORANDUM AND ORDER

JOHN W. OLIVER, District Judge.

This is an action by an individual plaintiff against his former employer, Trans World Airlines (TWA) and three labor organizations, International Association of Machinists and Aero Space Workers (The International), International Association of Machinists and Aero Space Workers, District 142 (District 142), and International Association of Machinists and Aero Space Workers, Local 1650 (Local 1650) seeking redress from alleged religious discrimination in violation of the Civil Rights Act of 1964. Plaintiff asserts that his discharge from employment because of his refusal to work from sundown Friday to sundown Saturday pursuant to the tenets of his religion was

a violation of his religious liberty, contrary to 42 United States Code, § 2000e-2. Plaintiff is a member of the World-wide Church of God.

The jurisdiction of this Court is based upon 42 United States Code, § 2000e-5(f). Defendant TWA is an employer engaged in interstate commerce and subject to Title VII of the Civil Rights Act of 1964, 42 United States Code, § 2000e et seq. Defendant unions are labor organizations likewise subject to the provisions of Title VII.

I.

Defendants first argue that this Court does not have jurisdiction in this case because of the alleged failure of the plaintiff to comply with the filing deadline of 42 U.S.C. § 2000e-5(d). That argument is answered by the decision of our controlling court in Richard v. McDonnell Douglas Corporation, 469 F.2d 1249 (8th Cir. 1972), which held that the 210-day statute of limitations is tolled upon receipt of the complainant's complaint by the E.E.O.C. Accordingly, in this case plaintiff's complaint of August 29, 1969, tolled the 210-day statute of limitations so that even if we assume that the E.E.O.C. assumed jurisdiction of plaintiff's case on November 18, 1969, the latest arguable date, plaintiff perfected his federal remedy well within the proper time. We find and conclude, therefore, that we do have jurisdiction of this case under the provisions of 42 U.S.C. § 2000e-5(d).

The defendant International challenges this Court's jurisdiction over it on the ground that there was no proper service of process on that organization. The alleged service was made by serving a copy of the complaint on James Tarwater, the financial secretary of Local 1650, who had no official capacity with the International.

We find and conclude that Local 1650 and The International are not autonomous and that, therefore, service upon the local constitutes valid service of process on The International. See Deboles v. Trans World Airlines, Inc., 350 F.Supp 1274 (E.D.Pa.1972) and Claycraft Co. v. United Mine Workers of America, 204 F.2d 600 (6th Cir. 1953).

We further find and conclude that because Local 1650, District 142, and The International are not autonomous, the interests of the latter two organizations were adequately represented before the E.E.O.C. by Local 1650. The argument, therefore, of defendants, District 142 and The International, that they could not be sued in federal court because they were not named in the complaint before the E.E.O.C. is without merit. See Moody v. Albemarle Paper Co., 271 F.Supp. 27 (E.D.N.C.1967).

Defendants argue also that plaintiff failed to exhaust his administrative remedies, first, because he did not pursue administrative remedies set out in the Railway Labor Act (45 U.S.C. § 151 et seq.) and, second, because he did not otherwise pursue contract grievance procedures. The first argument is answered by Norman v. Missouri Pacific Railroad, 414 F.2d 73 (8th Cir. 1969), which reversed the district court's dismissal of a complaint filed pursuant to Title VII of the Civil Rights Act of 1964. The Court of Appeals held that the complaint was cognizable under the Civil Rights Act absent specific prohibitions in the Railway Labor Act and that the Railway Labor Act did not foreclose efforts of employees to secure their statutory rights under the Civil Rights Act. No specific prohibition in the Railway Labor Act has been cited by defendants.

The second argument is answered by the recent decision of the Supreme Court in Alexander v. Gardner-

Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (February 19, 1974), which held that an employee is not foreclosed from suing in federal court under Title VII of the Civil Rights Act of 1964 after arbitration proceedings resulted in an unfavorable ruling. The Court concluded that no election of remedies principles inhered in Title VII. Submission of a claim to one forum does not preclude a later submission to another, Justice Powell declared in the majority opinion. It follows, therefore, that plaintiff can choose to proceed under Title VII without resorting to grievance procedures at all.

II.

The relevant factual circumstances of this case are not substantially disputed. Many of the facts stipulated by the parties in Standard Pretrial Order No. 2 are simply not relevant. Other findings suggested by the parties in which there is dispute are for the most part irrelevant. The facts as we have found them include only those relevant to the resolution of the legal questions presented and for the most part are those which admit of very little dispute. The following discussion will serve as our findings of fact and conclusions of law pursuant to Rule 52(a), Federal Rules of Civil Procedure.

A. *Union Responsibility*

Plaintiff names the three union defendants in his complaint and asks for an injunction against the unions to prevent them from failing to adequately represent the plaintiff and from depriving plaintiff of his right to freely exercise his religious beliefs without discrimination by the union. In his suggested conclusions of law, plaintiff states merely that defendant unions "discriminated against plaintiff by reason of his religion in violation of the Civil Rights

Act of 1964 by enforcing a collective bargaining agreement which was discriminatory against plaintiff in its application." Plaintiff cites a number of cases in support of this proposition without discussion. We have studied all of those cases. Most are entirely irrelevant to the issue of whether the union should be held responsible for the violation, if any, of the Civil Rights Act of 1964. Others are relevant only by broad application of the principles stated therein.

Labor union compliance with the Civil Rights Act of 1964 is dictated by 42 U.S.C. § 2000e-2(c):

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Although it is nowhere stated directly by plaintiff, it appears that he is complaining that the union discrimi-

nated against him because of its failure to refuse to comply with the seniority provisions of the collective bargaining agreement between TWA and The International, which governed plaintiff's employment. A violation of those provisions would have been required in order to adjust his schedule with one of the other workers on his shift so that he would be able to observe his Sabbath.

Plaintiff, in arguing that the Unions discriminated against him by "enforcing a collective bargaining agreement which was discriminatory against plaintiff in its application," is arguing that the Union acted wrongly by standing by the contract and refusing actively to support plaintiff's efforts to avoid the seniority provisions of the contract. This actually amounts to an assertion that the Union has a rather stringent duty to accommodate.

The duty to accommodate, which we shall discuss in more detail later in this opinion, at the time the alleged discrimination in this case took place, was required by E.E.O.C. guideline 29 C.F.R. § 1605.1:

> (b) The Commission believes that the duty not to discriminate on religious grounds, required by Section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation *on the part of the employer* to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. [Emphasis supplied]

The Unions interpret this language to mean that the duty is imposed only on the employer. They argue that that limitation was intentional because, they contend, a union has no power to accommodate. The Union only has power to control its own organization, make collective bar-

gaining agreements with the employer, and enforce those agreements. The employer, the Unions conclude, is the only one who is in a position to accommodate.

We disagree. The language of the regulation does speak in terms of the employer but so have other provisions and regulations pursuant to the Act, which have been interpreted to include the union. For example, 42 U.S.C. § 2000e-2(h), the provision on seniority systems discussed below has been applied to unions. See, e. g., Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969).

Furthermore, this case is a perfect example of a situation in which a union could accommodate a member if required to do so. TWA agreed that plaintiff could change shifts if the union approved. Such approval would mean that the union would have to suspend the operation of the seniority rules in plaintiff's case. Had the union made this accommodation, plaintiff would have been able to observe his Sabbath as he wished. The question, however, is whether Title VII imposed upon the unions the duty to ignore their contract under the circumstances of this particular case.

We do not believe that Title VII goes that far. We find and conclude that to require the union to ignore seniority in every case in which an employee with lesser seniority can observe his Sabbath only by changing shifts with a more senior employee would work an undue hardship on the union.

In an article written after Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), Professor Harry E. Edwards and Mr. Joel H. Kaplan expressed concern that the E.E.O.C. regulation imposing the duty to accommodate places an intolerable burden on the employer. They de-

scribed the burden of proving undue hardship as "nearly impossible to demonstrate if the work force is large enough." Edwards and Kaplan, Religious Discrimination and the Role of Arbitration Under Title VII, 69 Mich.L. Rev. 599, 628 (1971). They rightly argue that such an interpretation "imposes a priority of the religious over the secular" in that it might require an employer to favor employees whose religious beliefs require them to follow different schedules than the regular over other employees, even to the point of violating the other employees' bargained for rights. The same considerations apply in the case of the unions.

The labor-management contract to which the union is a party clearly sets out the seniority rules which are binding on the company and the union (Article VI(b), Pl.Ex. 30). That contract, of course, can not operate in violation of the laws of the United States but we do not believe that Title VII requires that the seniority provisions be ignored. Professor Edwards and Mr. Kaplan discuss this problem at length:

> Assume that an employer operates a seven-day-a week operation, that he has entered into a collective bargaining contract with the union, and that the contract provides for shift preference by seniority. What if a low-seniority employee, who works a shift that includes Saturday and Sunday, converts to a religion that requires him not to work on one of those days? Must the employer then transfer this employee out of a Sunday or Saturday shift even though numerous employees with greater seniority are required to work over the weekend? Under the E.E.O.C. guidelines, the transfer of one employee could hardly be said to create an "undue hardship" for the employer, but what of the other employees? What of the hardship imposed

> on the employee who waited a long time to acquire sufficient seniority in order to avoid weekend work and is now forced back into it because of someone else's religious beliefs? Are the religious beliefs of one individual so weighty that they supersede the lack of religious beliefs of another? [69 Mich.L.Rev. at 628].

Professor Edwards and Mr. Kaplan argue that the E.E.O.C. guidelines are confusing and could be construed to require the employer in every case to shift an employee out of seniority to accommodate religious beliefs. We do not believe that the E.E.O.C. guidelines require such a result. The hardship on employees should certainly be considered as hardship on the conduct of business, for the management of employees is one of the chief concerns of a large business and, in the case of a labor union, is the chief concern. A hypertechnical application of the words "undue hardship of the employer's business" by ignoring this fact, would, as Professor Edwards and Mr. Kaplan argue, impose "a priority of the religious over the secular" [69 Mich.L.Rev. at 628] and would perhaps raise constitutional questions.[1] See Dewey v. Reynolds Metals Co., 429 F.2d 324, 334-335 (6th Cir. 1970). We find and conclude, therefore, that it would have been an undue hardship for the unions to have changed plaintiff's shift in violation of the seniority provisions of the labor management contract.

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1. Professor Edwards and Mr. Kaplan direct attention to Judge Learned Hand's decision in Otten v. Baltimore & Ohio R.R., 205 F.2d 58, 61 (2d Cir. 1953), in which he stated:

> The First Amendment protects one against action by the government . . . but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. . . . We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world.

Finally, with reference to the seniority provisions, we find and conclude that 42 U.S.C. § 2000e-2(h), if not absolutely controlling, at least indicates that Congress did not intend that unions or employers be required to take actions that could impinge upon bona fide seniority systems. That Section reads as follows:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. [42 U.S.C. § 2000e-2(h)].

A significant judicial gloss has been placed on this language by courts processing racial discrimination cases. Consequently, a seniority system can not be "bona fide" if it perpetuates the consequences of past discrimination. In other words, a seniority system is not lawful if it freezes Negroes into past patterns of discrimination. See Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), cert. dismissed, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971); Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC v. United States, 416 F.2d 980 (5th Cir. 1969); and Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D. Va.1968).

Plaintiff does not urge, nor, do we think, may he urge, that the seniority system in this case locked in any discrimination against individuals of plaintiff's or anyone else's religion. The seniority system was not designed with the intention to discriminate against religion nor did it act to lock members of any religion into a pattern

wherein their freedom to exercise their religion was limited. It was coincidental that in plaintiff's case the seniority system acted to compound his problems in exercising his religion. He did not have sufficient seniority in the building to which he transferred to be able to impose his choice of days off over those of the other employees who had more seniority.

The duty to accommodate under the circumstances of this case, therefore, did not require the union to ignore its seniority system. It did, however, require that the union fairly represent the plaintiff when it became aware of the fact that plaintiff was facing difficulty in scheduling for his Sabbath and that he was in danger of disciplinary action by the company. See Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 988 (D.C.Cir. 1973), and United States v. Bethlehem Steel Corp., 312 F.Supp. 977, 988 (W.D. N.Y.1970), rev. on other grounds, 446 F.2d 652 (2nd Cir. 1971). A union always has an affirmative duty to protect its members from unlawful discrimination in its area of authority, i. e., negotiating a nondiscriminatory contract, Robinson v. Lorillard Co., *supra*; or processing grievances of discrimination, United States v. Bethlehem Steel Corp., *supra*.

In this case, since the collective bargaining agreement was essentially nondiscriminatory, it can only be argued by plaintiff that the unions failed to properly process his grievance. We do not believe that the facts sustain such a charge.

The union first learned about plaintiff's problem at a meeting that Hardison had with Everett Kussmann, Manager, Stores Systems, on September 6, 1968, and at which James Tinder, Local 1650 steward, was present. At that meeting, plaintiff's requirements for time off on religious holidays were discussed and Kussmann agreed that the

steward should seek to swap days off, to excuse time off on specific religious holidays if plaintiff agreed to work on regular holidays, and to attempt to find plaintiff another job (Pl.Ex. 16). There was no evidence that Tinder took any active part in that meeting. After the meeting plaintiff, on October 9, 1968, wrote Kussmann stating his satisfaction in the arrangements discussed and advising Kussmann that he had transferred to the 11 to 7 shift, which did allow him to observe his Sabbath (Pl.Ex. 2).

On December 2, 1968, plaintiff voluntarily transferred from Building 1 where he had sufficient seniority to bid on a shift which would allow him to observe his Sabbath, to Building 2, where he was second from the bottom in seniority.

Kussmann arranged for a meeting to be held on March 6, 1969 to discuss ways to avoid any difficulty that might arise because of plaintiff's new schedule. The Local 1650 steward, Mr. Tinder, was present at that meeting. Apparently several possibilities for meeting plaintiff's requirements were proposed: (1) changing plaintiff's shift; (2) changing plaintiff's job; and (3) allowing plaintiff to work four days a week. Tinder was amenable to working out plaintiff's problem on any of the above bases, subject, however, to the seniority provisions of the contract. On that date there were no jobs open for bid nor did plaintiff have sufficient seniority to bid on any other job (Tr. 168). The seniority provisions, therefore, precluded the possibility of plaintiff's changing his shift (Tr. 82-85, 154-155, 157-169, 193, 225-227). They also prevented plaintiff from changing his job (Tr. 167-168). The company was unwilling to permit plaintiff to work only four days a week (Tr. 270).

Plaintiff, therefore, was not satisfied with the results of this meeting. He did not, however, file a grievance with

the grievance committee as he knew he had a right to do (Tr. 169).

Plaintiff was absent from work on March 8, March 15, and March 22, 1969. On March 21, plaintiff met with A. J. Butcher, Supervisor, Stores Planning and Control, and James Tinder. As a result of that meeting Butcher wrote plaintiff on the same day advising him that a discharge hearing would have to be scheduled (Pl.Ex. 6).

Before the discharge hearing, the grievance committee met with plaintiff for approximately an hour and discussed the possible approaches to resolving the problem. Finally, the grievance committee decided that the best approach would be for plaintiff to remain on the job, pleading for leniency at the discharge hearing, and if that hearing resulted in discharge, to attempt to obtain a reversal of that decision at a higher level (Tr. 385). The possibility of the union waiving its seniority provisions so that plaintiff could get on a different shift was apparently not discussed (Tr. 389-391). Plaintiff told the committee to use its own judgment in presenting the grievance (Tr. 387).

After the meeting, but before the discharge hearing, plaintiff changed his shift to the twilight shift, which permitted him to have Saturdays off. The testimony was that the union believed at this time that its problems were solved (Tr. 391). But on March 28, 1969, plaintiff quit work at sundown and it became immediately apparent that the union would not be able to argue that plaintiff should not be dismissed because his conflicts had been resolved (Tr. 391-392).

Immediately prior to the discharge hearing on March 31, 1969, the union held another meeting with plaintiff and reviewed the various approaches to the problem and the procedures for appealing to District 142 if the company

decided to discharge plaintiff (Tr. 392-393). Plaintiff was told that he should sit next to Earl Box, Chairman of the Grievance Committee, so he could object to any errors made by the Committee.

At the hearing, the union argued against discharge on the grounds that procedural errors had been made and that discharge was too severe a penalty for the infractions with which plaintiff was charged (Joint Stip. 31).

Immediately after the discharge hearing Box again explained the appeals procedure to plaintiff (Tr. 397). On April 12, 1969, a letter was sent to plaintiff explaining that he had been found guilty of insubordination and was therefore, discharged. Several days later plaintiff again met with the Grievance Committee and asked about the possibilities of his resigning to keep his record clean. He was told that the company would probably not accept his resignation and was again told of appeal procedures and that the Local would forward the case to the District (Tr. 398).

Joseph Whitney Bowers, General Chairman of District 142, attempted several times but was unable to contact plaintiff (Tr. 446, 452). He finally arranged two different meetings with plaintiff, through plaintiff's father-in-law, Cyrus See (Tr. 444, 457). Plaintiff failed to make either one of them and Bowers, pursuant to standard procedures, dropped the case (Tr. 405-406).

In light of our findings of fact with regard to the union's actions in processing plaintiff's case, we find and conclude that the unions did not violate their duty to plaintiff under Title VII of the Civil Rights Act of 1964.

The duty of fair representation requires that the union act in good faith and without malice. See Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). We do not find that Local 1650's representation of the plaintiff

in his dispute with TWA was arbitrary, discriminatory, or in bad faith. Any failure on the part of District 142 to pursue the matter after discharge was due entirely to plaintiff's lack of cooperation, which made it impossible to proceed with an appeal. The problem never reached The International. We find and conclude, therefore, that judgment should be entered in favor of the three union defendants.

B. *TWA Responsibility*

Defendant TWA makes several arguments against plaintiff's contention that it violated Title VII of the Civil Rights Act of 1964 when it discharged him:

[1] A statutory requirement to accommodate religious needs of employees would violate the Establishment Clause of the First Amendment.

[2] Title VII of the Civil Rights Act of 1964 does not require employers to affirmatively accommodate employees' religious needs.

[3] TWA made reasonable accommodations to plaintiff's religious beliefs up to the point where further steps would have caused undue hardship.

[4] Plaintiff voluntarily placed himself in a position which he knew or should have known would diminish his chances for Sabbath observance.

[5] TWA did not "intentionally" discriminate against plaintiff on account of his religious beliefs. [Def. TWA Brief, pp. 35-36].

The first question that must be resolved is indicated by # 2 above and that is what kind of duty to avoid religious discrimination did Title VII of the Civil Rights Act of 1964 impose upon TWA. At the time of the acts com-

plained of, 42 U.S.C. § 2000e-2(a)(1) provided, in part, as follows:

> (a) It shall be an unlawful employment practice for an employer:
>
> (1) To fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

The statute did not provide for any duty on the part of an employer to accommodate the religious needs of employees.

The E.E.O.C. regulation which set out the guidelines on religious discrimination, however, provided as follows:

> (b) The Commission believes that the duty not to discriminate on religious grounds, required by Section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business . . . . [29 C.F.R. § 1605.1(b)].

The question, therefore, becomes whether the E.E.O.C. regulation is a proper interpretation of the Act before it was amended to specifically include a duty to accommodate. TWA cites Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), aff'd per curiam by an equally divided court, 402 U.S. 689, 91 S.Ct. 2186, 29 L.Ed.2d 267 (1971), in support of its position that the Act did not impose a duty to accommodate. In *Dewey*, an employee alleged he had been wrongfully discharged from his employment because

of his religious beliefs. The Court of Appeals held that the trial court had erred in applying the regulation, which was not in effect until July 10, 1967, to the activity of the employee, which took place in 1966. The Court, in Riley v. Bendix Corp., 464 F.2d 1113, 1117 (5th Cir. 1972) expressed the view that *Dewey* offers no guidance on the question of whether the regulation was a valid one because it was not in effect when the acts complained of took place. We agree.

We note further, however, that in *Dewey* the employer offered the plaintiff, as well as all other employees, the option of either working on Sunday or finding a replacement. The plaintiff did find replacements for five Sundays and then refused to find others, claiming that this practice was a sin. The Court of Appeals held that even if the 1967 regulation were applied, the employer made a reasonable accommodation by offering the replacement system.

Finally, *Dewey* was based in large part on the final award of a grievance arbitrator under the labor management contract, which has nothing to do with the question at issue here.

In Riley v. Bendix Corp., *supra*, the Court held flatly that the regulation was valid. It relied in part upon the amendment of the Act, which was approved by the Congress on March 8, 1972. Far from holding that that amendment indicates that the legislative intent of the old Act was not to include a duty to accommodate, as TWA argues we should conclude, the Court in *Riley* held the amendment validated and recognized the regulation as a proper interpretation of the old Act.

The amendment to 42 U.S.C. § 2000e(j) is as follows:

> The term "religion" includes all aspects of religious observance and practice, as well as belief unless an employer demonstrates that he is unable to rea-

sonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

The union's brief refers us to Eighth Circuit cases which state broad principles of statutory interpretation to the effect that amendments to statutes passed for the purpose of correcting a judicial interpretation should be applied prospectively only when Congress intended to change the former law as interpreted by the courts. That principle is obviously correct but defendants ignore the legislative history of the amendment at issue in this case.

The legislative history, reported at 118 Congressional Record, §§ 227-253, includes this statement by Senator Randolph of West Virginia, who sponsored the amendment:

> I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State or local governments. Unfortunately, the courts have, in a sense, come down on both sides of the issue. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on this question.
>
> This amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved. [118 Congressional Record at § 228]

The measure was passed in the Senate by unanimous vote.

The Chairman of the House Committee made this statement about the amendment:

> The purpose of this subsection is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in Dewey v. Reynolds Metals Company, 429 F.2d 325 [324] (6th Cir. 1970). Affirmed by an equally divided court, 402 U.S. 689 [91 S.Ct. 2186, 29 L.Ed.2d 267] (1971). [118 Congressional Record, pp. 1861-1862]

The measure was also passed in the House by unanimous vote.

We find and conclude that the legislative history of the amendment of the Act, together with the fact that weight should be given to the administrative interpretation of the Act, as reflected by the regulation (see Griggs v. Duke Power Co., 401 U.S. 424, 433, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)) indicate that regulation 29 C.F.R. § 1605.1(b) was facially valid and is controlling in this case.

We find TWA's argument that the duty to accommodate an employee's religious beliefs is a violation of the Establishment Clause of the First Amendment to be without merit. Defendant TWA correctly states the test for determination of whether a governmental action violates the Establishment Clause as it was set out in Committee for Public Education and Religious Liberty v. Nyquist et al., 413 U.S. 756, 772-773, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973); (1) that the law must reflect a clearly secular legislative purpose; (2) that the law must have a primary effect that neither advances nor inhibits religion; and (3) that the law must avoid excessive government entanglement with religion. Defendant, however, has not given the Court much guidance as to how the accommodation regulation runs afoul of this test other than arguing that the regulation "clearly places the sanction of law behind religion by facilitating and encouraging employees to take

time off from their jobs for religious observances so that employees with religious beliefs are aided as against non-believers." [Def. TWA Br. pp. 24-25]

It has been well established, however, that not every law that confers an incidental benefit on a religious institution or a person of a particular religion is, for that reason alone, constitutionally invalid. See, e. g., Walz v. Tax Commissioner, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), which held that a state could, consistent with the Establishment Clause, choose not to tax church property. Cf. Luetkemeyer v. Kaufmann, 364 F.Supp. 376 (W.D.Mo. 1973).

The duty to accommodate, as stated in 42 U.S.C. § 2000e(j), reflects the general secular legislative purpose of guaranteeing an employee that he will not be discharged from his job merely because of his religion. Consistent therewith, the regulation also imposed a duty to accommodate. The incidental effect of the regulation perhaps indirectly aids religion but its primary effect is to guarantee job security. The purpose and effect of the law as interpreted by the regulation is not primarily to aid religion but to prevent employers from devising means to discriminate which are not facially discriminatory but which do discriminate in effect and intent.

Finally, the regulation does not involve excessive government entanglement with religion. The regulation simply requires the employer to make affirmative efforts to accommodate the employee's religion. No further involvement is necessary than a judgment by the E.E.O.C. or the court that no such accommodation was made. That is not the kind of entanglement contemplated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), and Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971).

We find and conclude, therefore, that the interpretation of Title VII's prohibition of discrimination by reason of religion, as embodied in the E.E.O.C. regulation, 29 C.F.R. § 1605.1(b) does not violate the Establishment Clause of the First Amendment to the Constitution of the United States.

We must now determine whether TWA did in fact take steps to make an accommodation to plaintiff's religious needs. The interpretation of the statute embodied in the regulation requires that the employer show that it was unable to reasonably accommodate the employee's religious observance without undue hardship on the conduct of the employer's business. See, e. g., Riley v. Bendix Corporation, 464 F.2d 1113, 1118 (5th Cir. 1972).

TWA argues that it made three efforts to reasonably accommodate plaintiff's beliefs, that these were not successful from plaintiff's point of view, and that it was unable to make any further efforts. In April, 1968, plaintiff wrote Everett Kussmann, Manager of Stores Systems, asking for Friday sunset to Saturday sunset off (Pl.Ex. 1). In response to that request Kussmann (1) agreed to the union steward seeking to swap or days off; (2) to excuse time off on religious holidays if plaintiff agreed to work on "Christian" holidays if requested; and (3) to attempt to find plaintiff another job (Pl.Ex. 16). On May 7, 1968, the steward reported that he was unable to work out scheduling changes and that he understood that no one was willing to swap days with plaintiff (Pl.Ex. 17). TWA did not take part in the search for employees willing to swap shifts (Tr. 348) and it was admitted at trial that the Union made no real effort (Tr. 346-350). Plaintiff, however, was able for a period of time to work out his day off requirements within the framework of the seniority system (Tr. 214).

On October 4, 1968, plaintiff wrote a letter to Kussmann, informing him that he had worked out his days off requirement by transfer to the 11-7 shift and renewing his request for specific religious holidays off (Pl.Ex. 2). In response, Kussmann reiterated his offer to permit time off on plaintiff's religious holidays whenever possible and requested a list of those holidays (Pl.Ex. 3). On October 20, 1968, plaintiff supplied such a list and expressed his gratitude for Kussmann's "understanding and cooperation" (Pl.Ex. 4).

On December 2, 1968 plaintiff transferred from Building 1, where he had sufficient seniority to maintain a shift in which he could observe his Sabbath, to Building 2, where he was near the bottom of the seniority list and could not be assured a satisfactory shift. His reason for the change was that he was married at that time and a change to Building 2 permitted him to work the day shift and have his evenings free (Tr. 39). On March 7, 1969, a man of less seniority than plaintiff went on vacation and plaintiff was required to work in his position, which required him to work on Saturday (Tr. 39).

Kussmann anticipated difficulties due to the events described above and so arranged a meeting on March 6 with plaintiff and the union steward, James Tinder (Tr. 131). At that meeting Kussmann offered to accommodate plaintiff's religious observance by agreeing to any trade of shifts or change of sections that plaintiff and the union could work out (Tr. 121-132). Any shift or change was impossible within the seniority framework and the union was not willing to violate the seniority provisions set out in the contract to make a shift or change.

TWA claims that any further action on its part would have caused undue hardship to the conduct of its business.

First, had TWA forced another employee to trade shifts or jobs with plaintiff, such action would have violated the seniority provisions of the labor management contract and TWA would have been subjected to personnel problems and grievances (Tr. 157, 193).

Had TWA simply granted plaintiff days off on Saturday it would have left TWA short of help in that position. Plaintiff worked in the Stores Department of TWA's facilities at Kansas City International Airport (KCI). That department is responsible for housing, retaining, and making available parts for use by TWA at its overhaul base at KCI and throughout its system. It operates on a twenty-four hour, seven-day-a-week basis. On weekends TWA worked a minimum number of employees and plaintiff was the only person in his job on his shift during the weekends. To leave that position empty would have impaired the supplying of parts for essential airline operations (Tr. 220, 221, 264, 265, 286, 360, 361). To fill plaintiff's position with someone from another area would deprive that area of its regular manpower (Tr. 221, 262, 293, 294, 362). To bring in a man not working on that day would force TWA to pay premium wages for the time he filled in for plaintiff (Tr. 221, 263, 294).

TWA argues also that if all employees were treated uniformly as to their religious beliefs and observances, it could be very difficult to perform seven-day-a-week airline operations.

We find and conclude that TWA's actions with respect to working out plaintiff's religious observance was a reasonable accommodation by TWA and that any further action by TWA would have worked an undue hardship on the conduct of its business. The duty to accommodate does not require that an employer make every effort short of going out of business to permit his employees to stay on

the job and also to observe their religion. The term "*reasonable* accommodation" (emphasis added) should be read with the term "undue hardship" to arrive at the proper standard.

The duty imposed on an employer by Title VII is not a duty to impose hardships on the rest of his employees or members to accommodate the religious beliefs of a few. It is simply a duty to take affirmative action to try to find a way to permit the employee to observe his religion as he wishes, as opposed to a duty simply not to intentionally discriminate. A study of a very few cases that have decided the question of whether an employer has made a reasonable accommodation does not contradict that construction.

In Jackson v. Veri-Fresh Poultry, Inc., 304 F.Supp. 1276 (E.D.La.1969), plaintiff, a Seventh Day Adventist, was discharged from her position as a chicken picker when she advised the company that she would be unable to work between 5.00 p. m. Friday and 5:00 p. m. Saturday because of the requirements of her religion. There was no evidence that the company made any effort to accommodate her or that it would suffer undue hardship if it did not permit her the time off she requested. The company simply advised her that if she would not work company hours, she would be discharged. The Court found for plaintiff and ordered that she receive back pay

In Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972), the Circuit Court of Appeals for the Fifth Circuit reversed the decision by the district court, reported at 330 F.Supp. 583 (M.D.Fla.1971), that plaintiff was not entitled to relief because there was no intentional discrimination on the part of the company. The Court of Appeals held that the E.E.O.C. regulation was a valid interpretation of the Act

and that, therefore, the company had the burden of proving that it had attempted to make reasonable accommodations. The Court found no evidence on the record that the employer was unable to reasonably accommodate Riley's religious observance or practice without undue hardship on the employer's business.

In Reid v. Memphis Publishing Co., 468 F.2d 346 (6th Cir. 1972), the Court of Appeals for the Sixth Circuit reversed the decision by the district court that an employer had no duty to accommodate an employee's religious belief. The Court remanded the case with instructions that the trial court consider evidence on the issue of whether the employer could reasonably accommodate plaintiff's religion without undue hardship.

On remand the district court in Reid v. Memphis Publishing Co., 369 F.Supp. 684 (W.D.Tenn.1973) found that the employer had not offered any accommodation to the plaintiff and that no undue hardship would result in permitting the plaintiff, a Seventh Day Adventist, and a copy-reader for the defendant, to have Saturday off. Specifically, the court found that the newspaper had other copy-readers who could take plaintiff's place, that the newspaper's evidence concerning scheduling difficulties, morale problems, and financial burden was not sufficient to show undue hardship. The evidence on undue hardship, the court stated, was not specific and not of the requisite strength to sustain the employer's burden of proof.

In Claybaugh v. Pacific Northwest Bell Telephone Co., 355 F.Supp. 1 (D.Or.1973), the plaintiff was discharged from his job at one of Bell's operations that had a round-the-clock, seven-days-a-week schedule after he joined the Seventh Day Adventist Church and refused to work on his Sabbath, Saturday. The evidence showed that the em-

ployer would encounter difficulties in permanently changing plaintiff's schedule to meet his demands. The court found, however, that the employer had made absolutely no affirmative effort to accommodate plaintiff's religious observance. The company did not try to temporarily accommodate plaintiff, which it was clearly able to do, while attempting to find a permanent solution. It did not look for a possible trade with another employee nor an open position into which plaintiff could move to avoid the conflict with his religious beliefs. The court concluded that Bell had not made a reasonable accommodation.

In none of the cases cited did the employer show that it had taken affirmative action on behalf of the employee. In this case, and in sharp contrast, TWA established as a matter of fact that it did take appropriate action to accommodate as required by Title VII. It held several meetings with plaintiff in which it attempted to find a solution to plaintiff's problems. It did accommodate plaintiff's observance of his special religious holidays. It authorized the union steward to search for someone who would swap shifts, which apparently was normal procedure (Tr. 349). Witnesses for TWA testified that they attempted to work out plaintiff's problems in ways that had proved successful in similar cases (Tr. 305).

TWA would not have been placed in a position where it could not work out plaintiff's problem had plaintiff, to suit his own convenience, not transferred to Building 2 where he had insufficient seniority to bid on a suitable shift. That factor, however, should be viewed as a frustration of TWA's attempts to accommodate, and not as an action which relieved TWA of the duty to accommodate, as TWA argues.

We find and conclude that further accommodation by TWA would have worked an undue hardship on the con-

duct of its business. TWA had two choices for further accommodation: (1) to simply allow plaintiff to take his time off and attempt to replace him; or (2) to force another employee to change shifts.

TWA runs a twenty-four-hour-a-day, seven-days-a-week operation. Plaintiff performed an important job for TWA and was the only person performing his particular job on his shift during the weekend. To replace him with an employee from another area would leave that employee's work crew short. To replace him with an employee who was not regularly scheduled to work at that time would have caused TWA to pay premium wages. Both of these solutions would have created an undue burden on the conduct of TWA's business. Title VII cannot be interpreted to require that companies finance employee's religious beliefs.

TWA is a party to a labor-management contract which clearly sets out a seniority provision which is binding on the company and on the union (Article VI(b), Pl.Ex. 30) With respect to any asserted duty on the part of TWA to change plaintiff's shift in violation of the seniority provisions of the labor-management contract, the same considerations apply here as applied with respect to the union. Title VII does not force TWA to impose upon other employees because of one employee's religious belief. TWA's business includes the administration of its many employees and to impose hardships upon them imposes hardships upon the company's business. We find and conclude, therefore, that it would have been an undue hardship for TWA to have changed plaintiff's shift in violation of the seniority provision of the labor-management contract.

Finally, we again make reference to the seniority provisions of Title VII, 42 U.S.C. § 2000e-2(h), which ex-

empts different treatment to different employees based upon a bona fide seniority system from the other provisions of § 2000e-2 That section, as we stated in reference to the union's duty to accommodate, indicates that Congress did not intend that unions or employers be required to take actions that would impinge upon bona fide seniority systems.

For the reasons stated, we find and conclude that neither TWA nor any of the three unions violated Title VII of the Civil Rights Act of 1964 by reason of its discharge of plaintiff for his refusal to work on his Sabbath. Accordingly, it is

Ordered that the Clerk of the Court enter judgment for defendants.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1424

Larry G. Hardison,
Appellant,

v.

Trans World Airlines, Inc., International Ass'n of Machinists and Aero Space Workers, International Ass'n of Machinists and Aero Space Workers, District 142, and International Ass'n of Machinists and Aero Space Workers, Local 1650,
Appellees.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: December 10, 1974
Filed: December 16, 1975

Before LAY, BRIGHT and WEBSTER, Circuit Judges.

WEBSTER, Circuit Judge.

This appeal presents for our review important questions concerning the requirements of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, and the guidelines on religious discrimination promulgated thereunder, 29 C.F.R. §1605 (1974). Larry G. Hardison, a member

of the Worldwide Church of God, initiated this employment discrimination case against his union and his employer following his discharge as a Trans World Airlines (TWA) stores clerk for alleged insubordination. The factual background of this litigation is not disputed, and, in summarizing the relevant details, we rely heavily upon the findings of the District Court,[1] reported in *Hardison v. Trans World Airlines*, 375 F. Supp. 877 (W.D. Mo. 1974).

Hardison's job was covered by a collective bargaining agreement negotiated with TWA by the International Association of Machinists and Aero Space Workers, The International Association of Machinists and Aero Space Workers, District 142, and the International Association of Machinists and Aero Space Workers, Local 1650, all defendants below.[2] That agreement contained seniority provisions relating, *inter alia*, to days off and vacations.

The Stores Department at the Kansas City International Airport, in which Hardison had worked from June 5, 1967 until his discharge on April 2, 1969, operates twenty-four hours per day, seven days per week. Hardison initially worked as a stores clerk in Building No. 1, performing work which was essential to TWA's operation but not unique. In the spring of 1968, Hardison began studying the teachings of the Worldwide Church of God. That religion requires its members to refrain from all work on certain designated holidays as well as on its Sabbath, which occurs each week from sundown on Friday to sundown on Saturday. Hardison discussed his religious studies with Everett Kussman, the Manager of the Stores System, who notified a TWA supervisor by memo as follows:

1. Agreed to Steward seeking swap of days off

2. Agreed to odd holidays (excused T.O.) *if* he works the 'Christian' holidays when requested.

3. He advises you are getting him another job—agreed *you should*. Belongs to the 'World Wide Christian Church' Garner Ted Armstrong Ambassador College Pasadena Calif

Soon thereafter, the supervisor notified Kussman that he had been unable to make any "headway" in trying to resolve the problem. Hardison continued to work on Friday evenings and Saturdays, including some voluntary over-time work. On October 4, 1968, Hardison wrote Kussman that he had transferred to the 11:00 p.m. to 7:00 a.m. shift as a result of which he would be able to observe the Sabbath and would soon formally enter the Worldwide Church of God. He reminded Kussman of his assurance that Hardison would be excused from work on certain holidays under those circumstances. Subsequently, he furnished Kussman at his request a list of religious holidays and dates thereof.

On December 2, 1968, Hardison bid for a position as a stores clerk in another section in Building 2 in order to obtain a day shift position. Hardison indicated that his reason for transferring to the Building No. 2 section was his recent marriage: he felt day work would be more compatible with married life. Each of these stores clerk sections was governed by a separate seniority list. Thus, although Hardison had relatively high seniority in Building No. 1, he had the second lowest seniority position in

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1. The Honorable John W. Oliver, United States District Court for the Western District of Missouri.

2. While distinctions between the local, district, and international unions are made by appellees in this appeal, our holding makes it unnecessary to take account of such distinctions, and the unions are sometimes for convenience collectively referred to herein as "the union".

Building No. 2. As a result, his ability to select days off was considerably diminished.

In March, 1969, Bill Wyatt, the man on the bottom of the seniority list in the Building No. 2 section, went on vacation. Hardison was called to substitute for Wyatt, whose work schedule included Friday evenings and Saturdays. On March 6, 1969, Hardison met with Kussman and James Tinder, a union steward, to discuss the conflict between this schedule and Hardison's religious practices. Several possible adjustments were explored,[3] but since all required Hardison to do some work on the first Saturday, March 8, none of these adjustments were instituted. Hardison did not file a grievance concerning this unsatisfactory resolution although he knew he had a right to do so.

Hardison did not report for work on Saturday, March 8, informing the storekeeper that he had personal business to do. Hardison was likewise absent from work on the following two Saturdays, March 15 and March 22. He was then notified that a discharge hearing had been scheduled. Prior to that hearing, Hardison met with Local 1650's grievance committee. Various avenues of legal redress and defenses were discussed, and it was decided that the best approach would be a plea for leniency coupled with an effort to obtain reversal at a higher lever in the event of an adverse result. The possibility that the union might waive its seniority rules to permit Hardison to work on a different shift was not discussed. Following the meeting, Hardison voluntarily changed his shift to the "twilight shift" (3:00 p.m. to 11:00 p.m.) in an effort to resolve the problem. When Hardison left work early (at sundown) on Friday, March 28, however, it became ap-

3. These included such possibilities as changing Hardison's shift, changing his job, or permitting him to work four days per week rather than five.

parent that this change in schedule would not obviate future problems as Local 1650 had hoped.

The discharge hearing was held on March 31, 1969, before TWA representative J. H. Frey. Although Local 1650 argued that termination was too severe a penalty, Hardison was found guilty of insubordination and discharged on April 2, 1969. Thereafter, both Local 1650 and District 142 attempted to contact Hardison about pursuing the matter further, but upon receiving no cooperation from Hardison, they dropped the case.

Hardison filed an unlawful employment practice charge with the Equal Employment Opportunity Commission which deferred to the Missouri Commission on Human Rights. On February 10, 1972, after all administrative procedures had been exhausted, Hardison filed suit against TWA and the three unions in United States District Court pursuant to 42 U.S.C. §2000e-2.[4] He contended that all the defendants had practiced religious discrimination and, in addition, that the unions had violated their duty of fair representation. Following a trial to the court on primarily stipulated facts, judgment was entered for all defendants on the ground that each had attempted a reasonable accommodation of plaintiff's religious needs, as required by the controlling statutes and guidelines, and that undue hardships would have resulted from any greater efforts. *Hardison* v. *Trans World Airlines, supra.*

In essence, the decision below held that the valid seniority provisions of the unions' collective bargaining agreement with TWA did not permit further accommodation by any of the defendants. Hardison appeals, contending that the District Court's findings of reasonable accommodation and potential undue hardship were clearly

4. Federal jurisdiction was established below under 42 U.S.C. §2000e-5 and is not challenged on appeal.

erroneous. Separate briefs have been filed by Hardison, the unions, TWA, and by two amici curiae seeking reversal, the Equal Employment Opportunity Commission and COLPA (National Jewish Commission on Law and Public Affairs).

The issues before us include the alleged unconstitutionality of Title VII and the guidelines on religious discrimination, the extent of the unions' duty of fair representation under the circumstances presented, and whether the findings below that the defendants had fulfilled their respective duties to attempt a reasonable accommodation, short of undue hardship, of Hardison's religious practices were clearly erroneous.

I

STATUTORY AND REGULATORY FRAMEWORK

Our review must necessarily begin with an examination of the controlling statutes and regulations.

The Civil Rights Act of 1964 specifically forbids employers from practicing religious discrimination in specifically enumerated ways.

42 U.S.C. §2000e-2(a) provides in part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;
> * * *

42 U.S.C. §2000e-2(c) provides:

> It shall be unlawful employment practice for a labor organization—
>
> (1) to exclude or expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

The EEOC is empowered to promulgate regulations in aid of the statute. 42 U.S.C. §2000e-12(a). The original guidelines provided:

> However, the Commission believes that an employer is free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday.

29 C.F.R. §1605.1(a)(3), 31 Fed. Reg. 8370 (1966). The regulations were modified in 1967 to provide:

> The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

29 C.F.R. §1605.1(b), 32 Fed. Reg. 10298 (1967). The EEOC further placed upon the employer "the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable." 29 C.F.R. §1605.1(c), 32 Fed. Reg. 10298 (1967).

The possibility that the revised regulations might impose a burden (to accommodate) not contemplated by the statute which posed "grave constitutional questions" of violation of the Establishment Clause of the First Amendment was raised in dicta in *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, 334 (6th Cir. 1970), affirmed by an equally divided Court, 402 U.S. 689 (1971). *Dewey* also concluded that Title VII only prohibited acts taken with intent to discriminate. This conclusion was rejected by the Supreme Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

In 1972, Congress incorporated the substance of 29 C.F.R. §1605.1(b) into the Act by defining "religion" as follows:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. §2000e(j).

This amendment has been held to have eliminated all doubt that the guideline at 29 C.F.R. §1605.1 reflects the will of Congress. *Reid* v. *Memphis Publishing Co.*, 468 F.2d 346, 351 (6th Cir. 1972);[5] *Riley* v. *Bendix Corp.*, 464 F.2d 1113, 1116-17 (5th Cir. 1972). The District Court likewise so held, and we agree.

TWA LIABILITY

29 C.F.R. §1605.1, which we hold to be consistent with the statute, defines the parameters of the employer's duty. The company may not accept the role of a Pontius Pilate.[6] An effort to accommodate the employee's religious observances must be made. Such accommodation need only be a reasonable one. An accommodation alternative which imposes undue hardship upon the employer's business is unreasonable and not required. The burden of demonstrating its inability to reasonably accommodate falls upon the employer.

The record reflects a consistent effort by Hardison to acquaint TWA with his religious conversion and the effect of that commitment upon his ability to work during his

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5. In a second appeal, a different panel of the Sixth Circuit (Edwards, J., dissenting) seems to have receded from its prior holding that the regulation was consistent with the statute. *Reid* v. *Memphis Publishing Co.*, 521 F.2d 512 (6th Cir. 1975). We are more persuaded by the earlier opinion and by Judge Edwards' dissent.

6. Matthew 27:24.

Sabbath period and certain other religious holidays. He made no demands which were not consistent with his known religious beliefs. He was willing to work long weeks or short weeks provided his religious obligation to abstain from work on his Sabbath could be met. He even transferred to the twilight shift in order to minimize the impact of his absence on the company.

We cannot agree with the company's contention, apparently accepted by the District Court, 375 F. Supp. at 891, that Hardison's transfer from Building No. 1 to Building No. 2 was evidence of a lack of cooperation on his part. The implication is that if Hardison had not transferred he would have retained enough seniority in Building No. 1 to protect himself against Sabbath day assignments. This is not accommodation. To limit Hardison's right of transfer within the company as a condition of accommodation would be "to discriminate against [him] with respect to his * * * conditions, or privileges of employment, because of [his] * * * religion * * *." 42 U.S.C. §2000e-2(a)(1). The purpose of this transfer was to obtain a daytime shift, Hardison having recently married. While the regulation implies that the employee must be responsive to a reasonable accommodation, no such accommodation was ever offered by TWA, which at all times contended that it was precluded from accommodating Hardison's Sabbath observance by the collective bargaining agreement. Before an employer can assert the defense of non-cooperation, it is incumbent upon it to establish the accommodation which it has tendered and with which the employee refused to cooperate. *See Riley* v. *Bendix Corp., supra; Claybaugh* v. *Pacific Northwest Bell Telephone Co.*, 355 F. Supp. 1, 4-6 (D. Ore. 1973) (Employer should have attempted a temporary accommodation in view of its large work force).

Hardison's job assignment in Building No. 2 was to pick up or deliver parts needed by mechanics working in the building. He was to "run the train", that is, to continually make the rounds of the shops in the building. He was part of a work force of 38 to 40 people, although he would be the only person running the train during his particular shift on the weekend. TWA conceded that there were over 200 available employees who were capable of performing Hardison's work.

The District Court concluded that TWA had made a reasonable effort to accommodate Hardison's religious beliefs and that the alternatives rejected by TWA would have created an undue burden on TWA's business. Upon a full review of the record, we must respectfully disagree with both conclusions.

Alternatives Rejected

(1) Within the framework of the collective bargaining agreement, TWA could have permitted Hardison to work a four-day week. Hardison was willing to do this,[7] but the company would not agree because it would be shorthanded during one shift. It conceded that a supervisor could be utilized or another worker on duty elsewhere could be transfered, but urged that this would cause some other shop function to suffer. Similar arguments have been rejected by the Equal Employment Opportunity Commission. E.E.O.C. Decision No. 70-580 (March 2, 1970), 2 FEP Cases 516, 1973 CCH EEOC Decisions ¶6120; E.E.O.C. Decision No. 70-110 (Aug. 27, 1969), 2 FEP Cases 225, 1973 CCH EEOC Decisions ¶6062.

In determining whether a possible accommodation would result in undue hardship or mere inconvenience, we

7. Hardison was also willing to work a six-day week but this solution was in apparent violation of the 40 hour per week clause of the contract.

must look to the facts of each case. The burden of demonstrating undue hardship is upon the employer. In this case, the company contends that a short week for one man during the temporary period of Wyatt's vacation would have hampered its operations. Two company witnesses expressed such an opinion without any further evidence or factual support. We think the District Court erroneously drew an inference of undue hardship from such testimony. The actual hours involved in this case did not even amount to a full shift, since Hardison had transferred to the twilight shift and would have worked from 3:00 p.m. on Friday until sundown (approximately 6:30 p.m.), thus further reducing the impact upon the company's operations. Balanced against the interests to be protected by §2000e, we cannot say such an accommodation would result in an undue hardship to the employer.[8]

(2) Another alternative within the framework of the collective bargaining agreement was for TWA to fill Hardison's Sabbath shift from other available personnel. This could be accomplished by holding a worker over from the last shift, calling a worker in early, or, more logically, assigning a worker from the pool of 200 employees qualified to do the work. TWA contended that this alternative

8. Cases cited by TWA are readily distinguishable. They deal with situations where the work force available to accommodate the complaining employee's needs was small, *see, e.g.*, *Johnson* v. *United States Postal Service*, 364 F. Supp. 37 (N.D. Fla. 1973), *aff'd*, 497 F.2d 128 (5th Cir. 1974); *Drum* v. *Ware*, ... F. Supp. ....., 7 FEP Cases 269, 7 EPD ¶9244 (W.D. N.C. 1974); or where the employer presented no evidence to support its claim that it reasonably accommodated its employee's needs, *see, e.g.*, *Riley* v. *Bendix Corp.*, 464 F.2d 1113 (5th Cir. 1972), or that it would suffer undue hardship, *see, e.g.*, *Jackson* v. *Veri Fresh Poultry, Inc.*, 304 F. Supp. 1276 (E.D. La. 1969). Moreover, we think a totality of the circumstances approach must reject unproven assumptions that the company will be inundated with similar demands. That approach would be more persuasive at a point in time when the hardship was in fact evident and was manifestly undue. Hardison's request was the first of its kind which TWA's witnesses could recall.

would be an undue hardship because such workers must be paid overtime compensation. The District Court said, "The duty to accommodate does not require that an employer make every effort short of going out of business to permit his employees to s[t]ay on the job and also to observe their religion", 375 F. Supp. at 889, and that "Title VII cannot be interpreted to require that companies finance employee's religious beliefs." 375 F. Supp. at 891. These general statements, while arguably correct, may tend to distort the actual hardship which overtime payments would have imposed upon TWA to fill Hardison's Sabbath shift under the facts of this case. The regulation does not preclude some cost to the employer anymore than it precludes some degree of inconvenience to effect a reasonable accommodation. *Cf. Ward* v. *Allegheny Ludlum Steel Corp.*, 397 F. Supp. 375, 377 (W.D. Pa. 1975). The regulation expressly casts upon the employer the burden of proving undue hardship upon its business. Each case must stand upon its own facts. The actual cost of accommodation by filling Hardison's Sabbath shift from available personnel is not clear from the record. We do know that in this case the cost would have ended upon Wyatt's return from his vacation.[9] The company might well have concluded that the additional expense was preferable to getting along with one less man on the shift or suffering the administrative inconvenience of seeking a swap for Hardison. It does not appear from the record, however, that TWA gave any serious consideration to the reasonableness of such an alternative or to the extent of the burden it might create upon the business of TWA. We cannot say that its burden of proof has been met in this case.

9. It should also be obvious that neither Hardison nor his religion would have benefited financially from such an accommodation.

(3) A third alternative considered was a swap between Hardison and another employee, either for another shift or for the Sabbath days.[10] While both TWA and the union indicated no opposition to a voluntary swap, the acquiescence was clearly couched in terms of the limitations imposed by Article VI, the seniority clause of the collective bargaining agreement:

> (b) The principle of seniority shall apply in the application of this Agreement in all reductions or increases of force, preference of shift assignment, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement.

The company relied upon the union steward to handle the details. Every swap was technically at risk because the exchange was subject to the right of a senior worker to bump into the opening. Thus, the company and the union contended that they could not individually or jointly act to make a job exchange which would accommodate Hardison's religious need to be free of servile work on his Sabbath.

The proper relationship between a bona fide seniority system and the requirement of reasonable accommodation under 29 C.F.R. §1605.1 has not yet been settled by the

10. TWA had earlier agreed to a "swap" on Hardison's religious holidays provided Hardison was willing to work an equal number of "Christian" holidays and another employee was willing to trade with Hardison. None of the holidays (as distinguished from Sabbath days) had fallen on Hardison's shift prior to his discharge, and we are not concerned with whether TWA's posture with respect to such religious holidays was a reasonable accommodation. We note, however, that the undertaking was to permit a swap, not to find one or obtain union approval.

Supreme Court.[11] The Equal Employment Opportunity Commission has taken the position that when the inflexibility of a collective bargaining agreement is raised as a defense to charges of religious discrimination, that inflexibility must be justified by substantial business necessity. E.E.O.C. Decision No. 73-0314 (Aug. 31, 1972), 1973 CCH EEOC Decisions ¶6379; E.E.O.C. Decision No. 72-2066 (June 22 1972), 4 FEP Cases 1063, 1973 CCH EEOC Decisions ¶6367. At least one court has directed that an article in a collective bargaining agreement which would have required an employee to work occasional Saturdays in violation of his religious beliefs not be applied to such employee. *Drum* v. *Ware*, ... F. Supp. ....., 7 FEP Cases 269, 7 EPD ¶9244 (W.D. N.C. 1974). *But see Dawson* v. *Mizell*, 325 F. Supp. 511 (E.D. Va. 1971). It would seem that a collective bargaining agreement, the seniority provisions of which preclude *any* reasonable accommodation for religious observances by employees, is prima facie evidence of union and employer culpability under the Act.[21] We are not required to reach that point in this case, however, because the evidence is clear that

11. 42 U.S.C. §2000e-2(h) provides in part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply * * * different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. * * *

12. If Saturday work inevitably falls to the employees with lowest seniority, one may well ask whether such seniority provisions would not effectively preclude TWA from ever hiring those Seventh Day Adventists, Orthodox Jews, and members of the Worldwide Church of God whose religious convictions preclude work from sundown on Friday until sundown on Saturday. It is no answer to such a person, or to the statute itself, that if he compromises his religious beliefs for a time he may develop enough seniority to practice them again.

TWA did not seek and the union therefore did not refuse to entertain a possible variance.[13]

TWA did not even seek to find volunteers within the seniority system. It left that task to the union steward, who likewise did nothing. The matter was not referred to the Union Relief Committee, an informal organization of union members through which the union and TWA were normally able to avoid confrontations over seniority variances in special situations. This was the first Sabbath request which TWA and the union had received at the Kansas City operation. While company officials testified of their concern that giving Hardison a variance would irritate other union members, we find no evidence to support such an inference, nor are we convinced that such irritation, if real, would have been an undue hardship on the employer's business. *See Cummins* v. *Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975). *See generally,* Annot., 22 A.L.R. Fed. 580 (1975).

III

UNION LIABILITY

The District Court rejected the union's contention that the duty of accommodation falls only upon the employer and not upon the union. Judge Oliver observed:

> The language of the regulation does speak in terms of the employer but so have other provisions and

13. In *Shaffield* v. *Northrop Worldwide Aircraft Services, Inc.*, 373 F. Supp. 937 (M.D. Ala. 1974), a collective bargaining agreement which contained a seniority provision also contained a provision that "seniority cannot be the sole determining factor in making shift assignments." The court held that failure of the employer to seek a variance to permit the employee, a Seventh Day Adventist, to transfer to a position which would avoid his working on his Sabbath was a violation of Title VII. *But see Kettell* v. *Johnson & Johnson*, 337 F. Supp. 892 (E.D. Ark. 1972), decided prior to the 1972 Amendment to Title VII which makes clear that failure to make affirmative accommodation must be justified by the employer.

> regulations pursuant to the Act, which have been interpreted to include the union. For example, 42 U.S.C. §2000e-2(h), the provision on seniority systems discussed below has been applied to unions. See, e.g., Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969).
>
> Furthermore, this case is a perfect example of a situation in which a union could accommodate a member if required to do so. TWA agreed that plaintiff could change shifts if the union approved. Such approval would mean that the union would have to suspend the operation of the seniority rules in plaintiff's case. Had the union made this accommodation, plaintiff would have been able to observe his Sabbath as he wished.

375 F. Supp. at 882. We agreed with Judge Oliver's analysis and conclusion that in a proper case a union may be held to a duty of reasonable accommodation as well as the employer. This conclusion is consistent with the provisions of 42 U.S.C. §2000e-2(c), which declare it to be an unlawful employment practice for a union "to cause or attempt to cause an employer to discriminate against an individual in violation of this section." Thus, the union may be held liable if it purposefully acts or refuses to act in a manner which prevents or obstructs a reasonable accommodation by the employer so as to cause the employer to discriminate.

The District Court next considered the union's duty in light of its existing contract. Finding the seniority provisions of the contract to be facially neutral, the District Court held it to be "coincidental" that as to Hardison "the seniority system acted to compound his problems in exercising his religion." 375 F. Supp. at 883. The Dis-

trict Court further found that the union's duty to accommodate in this case "did not require the union to ignore its seniority system" and that the efforts of the union in behalf of Hardison did not violate its duty of fair representation. 375 F. Supp. at 883-85.

These conclusions are not directly challenged upon appeal, and the briefs and oral argument are directed to the breach of duty by TWA. We are thus not required to reach the substantive correctness of such conclusions. *Twin City Federal Savings & Loan Association* v. *Transamerica Insurance Co.*, 491 F.2d 1122, 1127 (8th Cir. 1974); *Mississippi River Corp.* v. *Federal Trade Commission*, 454 F.2d 1083, 1093 (8th Cir. 1972). We reserve for future cases the effect of a union's refusal to modify its employee seniority rights when no other accommodation can be accomplished without undue hardship to the employer's business. *See Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *petition for cert. dismissed*, 404 U.S. 1006 (1971).[14] At this point, no hard rules seem possible; the balancing of important competing interests must be done on a case by case basis.

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14. In *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir.), *petition for cert. dismissed*, 404 U.S. 1006 (1971), the Fourth Circuit held:

> Avoidance of union pressure also fails to constitute a legitimate business purpose which can override the adverse racial impact of an otherwise unlawful employment practice. The rights assured by Title VII are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert. Title VII requires that both union and employer represent and protect the best interests of minority employees. Despite the fact that a strike over a contract provision may impose economic costs, if a discriminatory contract provision is acceded to the bargainee as well as the bargainor will be held liable. [footnote omitted]

IV

CONSTITUTIONAL CLAIM

Since we conclude that TWA violated its duty of accommodation, we must reach its constitutional claim that Ttile VII violates the Establishment Clause of the First Amendment by requiring an accommodation. TWA contends that the statute is not neutral as between groups of religious believers and nonbelievers. *See School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963); *Everson* v. *Board of Education*, 330 U.S. 1 (1947). The view that it is constitutionally impermissible for a government to enforce accommodation of religious beliefs in a manner which results in privileges not available to a nonbeliever, or which result in inconvenience to the nonbeliever, is not without articulate support. *See* Edwards and Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 Mich. L. Rev. 599, 628 (1971). *But see* Comment, *Religious Observance and Discrimination in Employment*, 22 Syracuse L. Rev. 1019 (1971).

The District Court, however, found this constitutional attack upon the statute and guidelines to be without merit. It first applied the three-fold test set forth in *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 772-73 (1973): (1) the law must reflect a clearly secular purpose; (2) it must have a primary effect that neither advances nor inhibits religion; and (3) it must avoid excessive government entanglement with religion. The District Court stated:

> The duty to accommodate, as stated in 42 U.S.C. ¶2000e(j), reflects the general secular legislative purpose of guaranteeing an employee that he will not be discharged from his job merely because of his religion. Consistent therewith, the regulation also im-

poses a duty to accommodate. The incidental effect of the regulation perhaps indirectly aids religion but its primary effect is to guarantee job security. The purpose and effect of the law as interpreted by the regulation is not primarily to aid religion but to prevent employers from devising means to discriminate which are not facially discriminatory but which do discriminate in effect and intent.

Finally, the regulation does not involve excessive government entanglement with religion. The regulation simply requires the employer to make affirmative efforts to accommodate the employee's religion. No further involvement is necessary than a judgment by the E.E.O.C. or the court that no such accommodation was made. That is not the kind of entanglement contemplated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), and Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971).

375 F. Supp. at 888.

The same constitutional argument was recently raised in *Cummins* v. *Parker Seal Co., supra,* and similarly rejected. The Sixth Circuit held that both the statute and the regulation met the three-fold test of *Nyquist.* The purpose of the statute, it observed, was "to prevent discrimination in employment." *Id.* at 552. This purpose, it noted, was upheld against constitutional challenge in *Griggs* v. *Duke Power Co., supra,* which dealt with racial discrimination. It found further support in the reasoning of the Supreme Court in *Gillette* v. *United States,* 401 U.S. 437 (1971), wherein draft exemptions for conscientious objectors were upheld, not only upon pragmatic grounds but also because a valid state interest lay in the promotion

of conscientious action thought to be important in a democratic society. The Sixth Circuit noted that neither the statute nor the regulation advanced religion; no financial support was mandated for religious institutions. *See Lemon* v. *Kurtzman,* 403 U.S. 602, 612 (1971); *Walz* v. *Tax Commission,* 397 U.S. 664, 668 (1970). Finally, it noted that the mere requirement of reasonable accommodation involved far less government entanglement with religion than the Sunday closing laws sanctioned by *McGowan* v. *Maryland,* 366 U.S. 420 (1961). We find this reasoning persuasive, and we agree with the District Court's conclusion that the constitutional challenge must be rejected.

V

CONCLUSION

We affirm the entry of judgment in favor of defendant unions. Since we hold that TWA engaged in religious discrimination by breach of its duty to make a reasonable accommodation to the religious needs of Hardison through affirmative action, we reverse the judgment in favor of TWA and remand the case to the District Court for a determination of appropriate relief under 42 U.S.C. §§2000e-5(g) and 2000e-5(k).

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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September Term, 1975

Larry G. Hardison,
Appellant,

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Trans World Airlines, Inc., International Association of Machinist & Aerospace Workers,
International Assoc. of Machinists & Aerospace Workers, Dist. 142, and
International Assoc. of Machinists & Aerospace Workers, Local 1650,
Appellees.

Appeal from the United States District Court for the Western District of Missouri

---

On motion of Appellee, Trans World Airlines, Inc., it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

January 19, 1976

UNITED STATES COURT OF APPEALS
For the Eighth Circuit
St. Louis, Mo. 63101
January 15, 1976

Robert C. Tucker, Clerk

Hon. Michael Rodak, Jr., Clerk
Supreme Court of the United States
Supreme Court Building
Washington, D.C.

Re: No. 74-1424. Larry Hardison v. Trans World Airlines

Dear Sir:

Pursuant to request of Mr. George Feldmiller, Stinson, Mag, Thomson, McEvers & Fizzell, TenMain Center, Kansas City, Missouri we have prepared and are enclosing the two-volume certified transcript of record in the above case for use in the Supreme Court in connection with an application for writ of certiorari. The certified record consists of one volume of Appendix and one volume of the Proceedings in this Court.

Very truly yours,

Robert C. Tucker
Clerk

dw
enc
Copy
Hon. Robert H. Bork
Solicitor General
Mr. William H. Pickett
801 Traders Natl. Bank Bldg.
1125 Grand Avenue
Kansas City, Missouri

APPENDIX C

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
911 Walnut Street—Room 500
Kansas City, Missouri 64106

FIELD DIRECTOR'S FINDINGS OF FACT
Case No. YKC1 236
(TKCO 0061)

In Re:

Larry G. Hardison
Charging Party

vs.

Trans World Airlines, Inc.
Kansas City, Missouri
and
International Association of Machinists
and Aero Space Workers
Kansas City, Missouri
Respondents

Date of alleged violation: April 2, 1969

Date of filing of charge: October 28, 1969

Dates of service of charge: October 1, 1970 (Employer)
January 27 & 29 1971 (Union)

SUMMARY OF CHARGE

Charging Party alleges Respondent employer and Respondent union engaged in unlawful employment practices in violation of Ttitle VII of the Civil Rights Act of 1964, by discriminating against him with respect to the terms, conditions and privileges of his employment and resulting discharge because of his religion (Worldwide Church of God).

JURISDICTION

Respondent employer is engaged in interstate air transportation.

Respondent employer employs approximately five thousand employees at its overhaul base, situs of the charge.

Respondent union is one of the bargaining representatives for Respondent employer's employees and is a labor organization within the meaning of Section 701 (d) and (e) of the Act. It is represented at the situs by Local 1650 and by District 142, International Association of Machinists and Aero Space Workers.

The Commission received the charge on August 25, 1969, and deferred to the appropriate State agency on September 1, 1969. The charge was filed with the Commission on October 28, 1969, within the time prescribed by Section 707 (b) and (d) of Title VII.

SUMMARY OF FACTS AND EVIDENCE

1. Charging Party was hired by Respondent employer on June 5, 1967, as a stores clerk and worked in that capacity until his discharge on April 2, 1969.

2. The collective bargaining agreement between Respondent employer and Respondent union, signed August 25, 1966, was in effect during the Charging Party's employment. Article VI, Section "b" provides:

> "The principle of seniority shall apply in the application of this Agreement in all reductions or increases of force, preference of shift assignment, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement."

3. Building #1 Stores and Building #2 Stores are separate seniority groupings. Employees compete within a seniority grouping for shift assignments.

4. Immediately prior to December 2, 1968, the Charging Party was assigned to Building #1 on the graveyard shift, with Saturdays and Sundays off. On that date he was transferred to Building #2 after being the successful bidder on an opening. He was assigned to the day shift, with Saturdays and Sundays off.

5. About September, 1968, the Charging Party affiliated with the Worldwide Church of God. Article 12 of the Fundamentals of Belief of this church state:

> "We believe that from Friday sunset to Saturday sunset, the seventh day of the week is the Sabbath of the Lord our God. On this day we must rest from our labors, following the commands and example of the Apostle Paul, the New Testament Church, and Jesus."
>
> (Hereafter, this belief is called Sabbath—Observance).

6. Respondent employer was aware of Charging Party's religious belief as early as October 11, 1968.

7. Prior to March, 1969, Charging Party's Sabbath—Observance required no accommodation from Respondent employer. His regular days off both prior to and subsequent to his transfer from Stores 1 to Stores 2 enabled him to meet his religious requirement of Sabbath—Observance.

8. In March, 1969, a less senior employee within the same seniority grouping and classification as Charging Party, went on vacation. Respondent employer and union followed the customary procedures in applying

the principle of seniority in making shift assignments, and the Charging Party was transferred to fill the slot of the man on vacation, which included two midweek days off.

9. Subsequently, on two consecutive Saturdays, March 8 and 15, Charging Party did not report for work, without having received permission to be absent.

10. On March 21, 1969, Respondent employer warned Charging Party he would be scheduled for a discharge hearing if he failed to report to work on March 22, 1969.

11. Evidence on record indicates that on March 21st, the Respondent employer was aware that the reason for the Charging Party's failure to report the two previous Saturdays was his religious tenets which required Sabbath—Observance. Evidence on record further indicates the Respondent employer was aware that the Charging Party had discussed this with his minister, and there was no provision that would allow him to deviate from the requirement.

12. Charging Party did not report for work on March 22, 1969. A discharge hearing was held on March 31, 1969, and Charging Party was found guilty of insubordination for refusal to work on Saturdays, and was discharged effective April 2, 1969.

13. Respondent employer asserts that to permit Saturday —Observance by the Charging Party would discriminate against its other employees who would have to work Saturdays in the place of Charging Party. Respondent employer further asserts that such unequal administration of the collective bargaining agreement would create chaotic personnel problems through a

multitude of grievances, and that this would be an undue hardship.

14. There is no evidence that Respondent employer has accommodated any other Sabbath—Observer at this situs, or has been requested to do so.

15. Respondent union asserts that if Respondent employer were to accommodate Charging Party in his Sabbath—Observance needs, "it would make seniority rights meaningless."

16. The Respondent union participated in the Step 2 discharge hearing.

17. It is undisputed that at the discharge hearing all parties were aware of Charging Party's needs as a Sabbath—Observer. The subject of the discharge hearing centered around the disciplinary action to be taken, and consideration of accommodating a Sabbath—Observer was not discussed by either Respondent company or Respondent union.

/s/ Charles E. Clark
Charles E. Clark, Field Director

April 15 '71
Date

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
911 Walnut Street—Room 500
Kansas City, Missouri 64106
April 3, 1972

In reply refer to:
TKCO 0061

Mr. Larry Hardison
8704 Wornall
Kansas City, Missouri

Dear Mr. Hardison:

The Equal Employment Opportunity Commission has investigated your charge of employment discrimination and has found reasonable cause to believe that your charge is true. A copy of the decision is enclosed.

The Commission will attempt to eliminate this practice by conciliation as provided in Title VII. Conciliation efforts will be undertaken by a member of the staff of this office. He will be in contact with you within the next thirty (30) days and you will kept informed of the progress of conciliation efforts.

Should you have any questions regarding this case please contact me at the above address.

Sincerely yours,

/s/ B. A. Villarreal
B. A. Villarreal
Kansas City District Director

BAV:jaw
Enclosure
cc: Michael D. Gordon, Attorney
Thomas J. Cox, Jr.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20506
Case No. YKC1-236

Larry G. Hardison
Charging Party

v.

Trans World Airlines, Inc.
Kansas City, Missouri

and

Local 1650 and District 142,
International Association of
Machinists and Aerospace Workers,
AFL-CIO
Kansas City, Missouri
Respondent

DECISION

The Commission has considered the Field Director's Findings of Fact issued April 15, 1971 and has examined the entire record. To the extent that exceptions and cross-exceptions filed by the parties raise material issues they are discussed herein. The Commission adopts the Findings of Fact insofar as it comports with this decision.

It is undisputed that Charging Party was discharged because of his refusal to work on Saturdays. Sabbath (Saturday) labor is contrary to the convictions and requirements of the religion of which he is an adherent—Worldwide Church of God.

Whether Charging Party attempted to secure the needed accommodation through contractual grievance procedures is disputed by the parties. It is not possible, on this record, to determine with reasonable certainty the steps taken by him to arrange an accommodation of his

religious tenets. In any case, it is now well settled that a Charging Party's failure to exhaust contractual grievance procedures is irrelevant to this Commission's jurisdiction under Title VII. *Hutchings* v. *U.S. Industries,* 428 F.2d 303 (5th Cir. 1970).

Charging Party's transfer may have been an error on his part inasmuch as it complicated his refusal to work Saturdays, however, he states that he assumed differences could be worked out. Of course, remedial action need not, in addition to accommodating Charging Party's religion, preclude concomitant inconvenience to make his accommodation possible.

Respondent Employer's contention that accommodating Charging Party would discriminate against other employees is without merit. Respondent Employer has not shown that "chaotic" personnel problems would result or that such accommodation would trigger a multitude of grievances as feared. All such grievances, which Respondent Employer speculates would result, could be defended on the basis of compliance with Title VII. Since the Union is a party to this action, we may presume that unmeritorious grievances will not be processed.

Respondents' refusal to authorize and accommodate absences for religious purposes had the foreseeable effect of requiring Charging Party either to abandon a fundamental precept of his religion or to forfeit his employment with Respondent Employer. There is no claim on employees of other religions. Thus, though on its face the policy appears to apply even-handedly, it had a harsher impact on Charging Party than on other employees solely because his religion is different from theirs.[1] Title VII requires

1. Cf., *Sherbert* v. *Verner,* 374 U.S. 398 (1963), where the Court held that a seemingly neutral State policy was unconstitutional when it placed a Seventh Day Adventist in a position similar to Charging Party's.

that Respondent consider the foreseeable effects of a superficially even-handed application of a particular policy. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Where an employment policy has a disproportionate impact on members of a particular group, the employer has the burden of showing that the policy is so necessary to the operation of its business as to justify the policy's discriminatory effects, *Griggs, supra*; cf., *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967). See also, EEOC Guidelines on Religious Discrimination, 29 C.F.R. 1605.1.

In *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), aff'd per curiam by an equally divided court, 35 U.S.L.W. 3526 (U.S. June 1, 1971)[2] the court ordered dismissal of a complaint similar to Charging Party's because, inter alia, to grant plaintiff's request for special treatment would be to discriminate against other employees and could create personnel problems and lead to grievances and attendant arbitration.[3] It is the Commission's position that reasonable accommodation of the religious beliefs of particular employees does not discriminate against other employees whose religious beliefs do not require accommodation. We respectfully disagree with the decision in *Dewey* to the extent that it would require less than a showing by an employer that "chaotic personnel problems" will ensue if the religious needs of particular employees are accommodated.

---

2. Decision by an equally divided court, of course, creates no precedent. *Durant* v. *Essex Co.*, 7 Wall. 107, 110, 19 L.Ed. [sic] 154, 147 (1869); *United States* v. *Pink*, 315 U.S. 203 (1942); *Ohio ex rel. Eaton* v. *Price*, 364 U.S. 263, 264 (1960). Moreover, the per curiam affirmance provides no indication as to the basis for the Court's decision.

3. The result in *Dewey, supra*, was also based upon facts which are not present here.

There is reasonable cause to believe that Respondents have engaged in an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964, as alleged.

For the Commission
/s/ Eduardo Pena Jr.
Director of Compliance

Mar. 15, 1972
Date

APPENDIX D

The following selections are excerpts of the trial transcript that are cited in the petition and not made part of the appendix on appeal to the circuit court:

(1) Exhibit A to Hardison's Complaint—The EEOC charge filed by Hardison provides, in pertinent part, as follows:

> ". . . During the time between October '68 and March '69 I had transferred to a different shift (still in Stores), and in the engine overhaul building. During the month of February vacations were scheduled. The man with lowest seniority scheduled his vacation for March 3rd thru March 14th. . . ."

(2) The following testimony was elicited from Hardison by his counsel on page 81 of the trial transcript:

> Q. Then did you have any difficulty observing the Sabbath while you were in Building 2?
> A. Only until—I kept the Sabbath until the man of less seniority than I went on vacation.
> Q. All right, this would have meant that you would have worked on March 8 and March 15 to replace him, is that not correct?
> A. Yes.

(3) The following testimony was elicited from Hardison by counsel for the union on pages 73-74 of his deposition:

> Q. Who was the plaintiff in that action, you or your wife?
> A. My wife.
> Q. Did you contest the divorce?
> A. No, I allowed it.
>
> * * *

> Q. What were the allegations in the divorce?
> A. Nonsupport.
>
> * * *
>
> Q. Well, is there any church teachings on divorce?
> A. Well, just what the Bible says, that there is only one cause of divorce.
> Q. What is that?
> A. Well, Christ put it fornication, which is fraud.
> Q. Well, at the time your wife filed for divorce, you would have been baptized, is that correct?
> A. Yes, sir.

(4) The following testimony was elicited from Hardison by counsel for the unions on pages 195-197 of the trial transcript:

> Q. Have you been a member of the Minutemen?
> A. Yes.
> Q. Are you a member now?
> A. No.
> Q. When you were a member of the Minutemen, isn't it true that you used your employment to keep lists at the Gas Company, to keep lists of people who had guns and copying machines and things like that which you turned over to Robert DePugh and other people at the Minutemen?
> A. Well, I didn't work at the Gas Company. I did keep a log, but I didn't turn it over to anybody. I have since destroyed it.
> Q. Isn't it true that you have told your church that if you get any money out of this suit that you will share it with them?
>
> Mr. Pickett: Your Honor, I object to any reference whatsoever to any - - - -
>
> * * *

The Court: Well, I am going to sustain the objection. That is in the kitchen sink category, if I may say so.

(5) On pages 279, 280 and 474 of the trial transcript, Judge Oliver made the following observations:

". . . we can start on our way to the Supreme Court, because this Court is fully cognizant of the fact that the importance of the legal question presented is such that action taken by this Court and necessarily having to decide the question presented obviously will be appealed, first to the Court of Appeals and finally to the Supreme Court of the land, because I know of no case that presents the issue quite as sharply. . . .

* * *

". . . this is an ideal case to test the basic legal question presented and that they are on their way to the Court of Appeals and eventually to the Supreme Court of the United States, and I think it is a case where it is obvious that counsel have made the determination and have elected to put the effort and money into it, and they should be afforded every possible opportunity to accept the Court's invitation to introduce, maybe even the kitchen sink. . ."

* * *

"I enjoyed meeting all the witnesses. I wish you good luck, and I again make the observation that I was impressed with the men who were on the line handling the problem."

Supreme Court, U. S.
FILED
FEB 17 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1126

TRANS WORLD AIRLINES, INC.,
Petitioner,

vs.

LARRY G. HARDISON, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 142, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 1650,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AMICUS CURIAE BRIEF

Of Chrysler Corporation in Support of the Petition for a Writ of Certiorari of Trans World Airlines, Inc.

WILLIAM G. GUERRI
EDWIN D. AKERS, JR.
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TABLE OF AUTHORITIES CITED

Cases

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Blakely v. Chrysler Corp. et al., 12 FEP Cases 145 (E.D. Mo. 1975)	2, 3
Bradington v. International Business Machs. Corp., 360 F.Supp. 845 (D.Md. 1973), aff'd 492 F.2d 1240 (4th Cir. 1974)	8

Burns v. Southern Pac. Transp. Co., 11 FEP Cases 1441 (D.Ariz. 1976) 8

Claybaugh v. Pacific Northwest Bell Tel. Co., 355 F. Supp. 1 (D. Ore. 1973) 8

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Cooper v. General Dynamics, 378 F.Supp. 1258 (N.D. Tex. 1974) 8

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Dewey v. Reynolds Metals Co., 402 U.S. 689 (1971) aff'g by an equally divided Court, 429 F.2d 324 (6th Cir. 1970) 6, 7, 12

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Draper v. U.S. Pipe & Foundry Co., 11 FEP Cases 1106 (6th Cir. 1975) 3

Drum v. Ware, 7 FEP Cases 269 (W.D.N.C. 1974) 8

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Fischer v. Alsing, 7 FEP Cases 220 (D.Ore. 1974) 7, 8

Gillette v. United States, 401 U.S. 437 (1971) 12

Hardison v. Trans World Airlines, Inc., et al., 11 FEP Cases 1121 (8th Cir. 1975) rev'g 375 F.Supp. 877 (W.D. Mo. 1974) 2, 3, 6, 9, 10

Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203 (1948) 12

Jersey Cent. Power & Light Co. v. IBEW Local 327 et al., 508 F.2d 687 (3d Cir. 1975) petition for cert. filed, 44 U.S.L.W. 3084 (U.S. Aug. 1, 1975) (No. 75-182) ... 13

Johnson v. United States Postal Serv., 497 F.2d 128 (5th Cir. 1974) 10

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McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 9

Olds v. Tennessee Paper Mills, 11 FEP Cases 350 (E.D. Tenn. 1974) 8

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Reid v. Memphis Publishing Co., 468 F.2d 346 (6th Cir. 1972) 3, 7

Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972) ... 6, 7

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Scott v. Southern Calif. Gas Co., 7 FEP Cases 1030 (C.D. Cal. 1973) 7

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Torcaso v. Watkins, 367 U.S. 488 (1961) 13

United States v. City of Albuquerque, 10 FEP Cases 771 (D.N.M. 1975) 8

Walz v. Tax Comm'n, 397 U.S. 664 (1970) 13

Ward v. Allegheny Ludlum Steel Corp., 397 F.Supp. 375 (W.D. Pa. 1975) 7, 8

Weitkenaut v. Goodyear Tire & Rubber Co., 381 F.Supp. 1284 (D.Vt. 1974) 7, 8, 14

Yott v. North Am. Rockwell, 501 F.2d 398 (9th Cir. 1974) 8, 14

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Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, amending, 42 U.S.C. § 2000e (1972) 6

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EEDC Guidelines on Discrimination Because of Religion
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Rule 58 F.R.Civ.P. 2

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Comment, 44 Fordham L. Rev. 442 (1975) 13

Conference Committee Report to the Equal Employment Opportunity Act of 1972, 118 Cong. Rec. 7167 (1972) 6

Edwards and Kaplan, Religious Discrimination and the Role of Arbitration Under Title VII, 69 Mich.L.Rev. 599 (1971) 9

Edwards and Zaretsky, Preferential Remedies for Employment Discrimination, 74 Mich.L.Rev. 1 (1975) 13

P. Kamper, Religion and the Constitution (1964) 9

Note, Religious Observance and Discrimination in Employment, 22 Syracuse L.Rev. 1019 (1971) 9

U.S. Bureau of the Census, Statistical Abstract of the United States, 1975 (96th ed. 1975) 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1126

TRANS WORLD AIRLINES, INC.,
Petitioner,

vs.

LARRY G. HARDISON, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 142, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 1650,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AMICUS CURIAE BRIEF

Of Chrysler Corporation in Support of the Petition for a Writ of Certiorari of Trans World Airlines, Inc.

Chrysler Corporation ("Chrysler") supports the petition of Trans World Airlines, Inc. ("TWA") and respectfully urges that this Honorable Court issue its writ of certiorari to review the decision of the Court of Appeals for the Eighth Circuit. This amicus curiae brief is submitted by Chrysler upon the consent of all the parties pursuant to Supreme Court Rule 42.[1]

[1] The written consents of the parties have been filed with the Clerk.

INTEREST OF THE AMICUS CURIAE

Chrysler is a major manufacturer and distributor of motor vehicles and parts, transacting business both in interstate and foreign commerce. Its United States work force, involved in the manufacture and distribution of motor vehicles and parts, numbers in excess of 130,000, and of these, approximately 108,500 employees, or 83%, are encompassed by Chrysler's collective bargaining agreements with the United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW"). Pursuant to the provisions of the National Labor Relations Act, 29 U.S.C. §§151 *et seq.*, these collective bargaining agreements govern Chrysler's relationship to its employees regarding wages, hours and other terms and conditions of employment.

This case requires the Court to review the constitutionality of the statutory duty prescribed by Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. §2000e(j) of an employer to reasonably accommodate the religious needs of an employee. Chrysler's interest in this action evolves from its need, as a major American employer, to know the specific legal standard applicable to employers when they are confronted with a request for the modification of uniform contractual work standards and hours due to the individual's religious observances.

Chrysler's interest in this action is direct, for as a party to *Blakely v. Chrysler Corp. et al.*, 12 FEP Cases 145 (E.D. Mo. 1975),[2] a case involving allegations of religious discrimination, the law of the Eighth Circuit, as set forth in *Hardison v. Trans-World Airlines, Inc., et al.*, 11 FEP Cases 1121 (8th Cir. 1975)

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[2] The District Court opinion is reproduced in the appendix hereto. As of the filing of this brief, post-trial motions filed by Chrysler pursuant to Rules 52 and 58 F.R.Civ.P. were overruled by order of the District Court dated January 29, 1976.

rev'g, 375 F. Supp. 877 (W.D. Mo. 1974), is presumably dispositive as to many of the legal issues presented in *Blakely, supra.* In fact, the District Court, as it must, relied extensively upon *Hardison* in its *Blakely* opinion.

Furthermore, as the recent decision of the Sixth Circuit in *Reid v. Memphis Publishing Co.*, 521 F.2d 512 (1975), is irreconcilable with *Hardison, supra,* a conflict between the circuits has resulted.[3] As a consequence, insofar as Chrysler operates plants within both jurisdictions, the existence of the inconsistent or varying adjudications by these courts establishes incompatible standards for the guidance of any interstate employer, including Chrysler.

It is also significant to note the effect upon Chrysler of an intra-circuit conflict within the Sixth Circuit. *Compare, Reid v. Memphis Publishing Co.*, 521 F.2d 512 (6th Cir. 1975), *with Reid v. Memphis Publishing Co.*, 468 F.2d 346 (6th Cir. 1972), *and Draper v. U.S. Pipe & Foundry Co.*, 11 FEP Cases 1106 (6th Cir. 1975), *and Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3207 (U.S. Sept. 25, 1975) (No. 75-478). Chrysler, which maintains its headquarters and operates numerous facilities in Detroit, Michigan, within the jurisdiction of the Sixth Circuit, is directly entrapped in the vacillation of that Circuit as is TWA.

QUESTIONS PRESENTED

1. Whether, under the establishment clause of the first amendment, it is constitutionally permissible for Title VII of the Civil Rights Act of 1964, as amended, to impose upon an employer the burden of reasonably accommodating the religious preferences of an employee.

---

[3] The conflict is not solely between the Sixth and Eighth Circuits. See infra at 9-10.

2. Whether, the duty of reasonable accommodation, if constitutional, requires an employer to modify uniform work obligations, established through collective bargaining, in contravention of contractual seniority rights.

3. Whether, an employee requesting the accommodation of his religious convictions must, prior to requiring his employer to make any accommodation, fulfill a duty of "self-accommodation" by: a) promptly and fully notifying his employer of his affiliation and the religious obligations thereby imposed upon him; b) providing his employer with documentation or other satisfactory means to verify the claimed religious affiliation as well as the resulting religious obligations which conflict with uniform work obligations; c) utilizing those means of relief available solely to the employee (e.g., vacation scheduling, election of shift preference, etc.); d) participating and cooperating in the formulation and implementation of a plan of reasonable accommodation.

4. Whether the EEOC guideline on religious discrimination, 29 C.F.R. § 1605.1(c), 32 Fed. Reg. 10298 (1967), promulgated before the effective date of the 1972 amendments to Title VII of the Civil Rights Act of 1964 should be given retroactive application.

5. Whether the Supreme Court should exercise its supervisory power, through the issuance of its writ of certiorari, to resolve inter-circuit conflicts which have arisen.

STATEMENT OF THE CASE

The statement of the case of TWA fully and accurately sets forth the factual background and the previous proceedings in this case. For the sake of brevity, we adopt that statement.

REASONS FOR GRANTING THE WRIT

I. The Questions Presented Are of National Importance and the State of the Law Is Uncertain

The United States is, by nature, both an industrialized and a reverent country.[4] The questions presented by this case bring these two national characteristics into sharp conflict. It is of the utmost importance that both employers and employees have the benefit of the guidance of this Honorable Court in order to bring about a reconciliation between an individual employee's religious practices and an employer's establishment of uniform work obligations.

Unlike race or sex discrimination, religious discrimination is based upon the presence of intangible concepts uniquely known only to the discriminatee. Religious affiliation and precepts are incapable of visual verification by an employer who, by comparison, can easily ascertain sex or race. Under the present state of the law, the burden of accommodation imposed upon an employer requires a minimal knowledge of the employee's religion and an active role in accommodating it.

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[4] As of April, 1975, approximately 77,994,000 persons were employed in non-agricultural establishments, including manufacturing, wholesale and retail trade, government, transportation and public utilities, finance, insurance and real estate, contract construction and mining. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1975*, Table No. 579 at p. 353 (96th ed. 1975).

Membership in religious bodies for the year 1973 totaled 131,245,000. Some denominations celebrating a Sabbath which commences on Friday sundown and ends on Saturday, include the following: Seventh-Day Adventists—464,000; Jewish—6,115,000.

The burden imposed upon an employer is by no means limited to reasonably accommodating Sabbatarians. Many Americans are affiliated with non-Judeo-Christian religions which celebrate entirely different holidays. The only such religion with a membership in excess of 50,000 is the Buddhist persuasion—60,000. *Id.*, Table No. 63 at p. 46.

The significance of this case cannot be minimized, particularly considering that the constitutionality of the statutory provision and guideline in question[5] has yet to be determined by this Court. The sole religious discrimination case previously to reach this Court was *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971) *aff'g by an equally divided Court*, 429 F.2d 324 (6th Cir. 1970). It is beyond challenge that *Hardison* involves serious questions of federal law which have not been, but should be, settled by this Court.[6] Considering the serious fundamental

[5] The present EEOC Guideline, 29 C.F.R. § 1605.1, was promulgated by the Commission in 1967. The previous regulation, issued in 1966, 29 C.F.R. § 1605.1(a)(3), did not require an employer to reasonably accommodate an employee and it contained the following guideline:

> "(3) The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs."

Congress, by the enactment of The Equal Employment Opportunity Act of 1972, Pub.L. No. 92-261, 86 Stat. 103, effective March 24, 1972, added the new section to Title VII, 42 U.S.C. § 2000e(j) which defines "religion". The legislative history as to this specific provision is illuminating:

> "The purpose of this subsection is to provide the statutory basis for EEOC to formulate guidelines because of religion such as those challenged in Dewey v. Reynolds Metals Company, 429 F.2d 325 (6th Cir. 1970), Affirmed by an equally divided court, 402 U.S. 689 (1971)."

Conference Committee Report to the Equal Employment Opportunity Act of 1972, 118 Cong. Rec. 7167 (1972).

Thus, the legislative history directly supports the proposition that, until 1972, the EEOC regulation of 1967 exceeded the statutory scope of Title VII and that it can only be applied prospectively to acts occurring subsequent to the amending of Title VII. *E.g., contra, Riley v. Bendix Corp.*, 464 F.2d 1113 (5th Cir. 1972).

[6] The Eighth Circuit itself was cognizant of the importance of this case for it stated in *Hardison v. Trans World Airlines, Inc.*, 11 FEP Cases at 1122:

> "This appeal presents for our review important questions concerning the requirements of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the guidelines on religious discrimination promulgated thereunder, 29 C.F.R. § 1605 (1974)."

constitutional questions concerning this statutory provision and its effect upon the majority of this country's work force, this Court should issue its writ of certiorari in order to pass upon the issues raised by this case.

Further assuming, *arguendo*, the constitutionality of the imposition of the duty of reasonable accommodation, that duty is presently inadequately defined and is without parameters. Congress has merely codified, at 42 U.S.C. § 2000e(j), the following definition of "religion":

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

Similarly the Sixth Circuit has stated:

> "This appeal presents still another difficult problem concerning the prohibition of religious discrimination contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1970)."

Reid v. Memphis Publishing Co., 468 F.2d 346, 347 (6th Cir. 1972).

The following cases have upheld the constitutionality of this statutory and/or regulatory provision: *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975) *petition for cert. filed*, 44 U.S.L.W. 3207 (U.S. Sept. 25, 1975) (No. 75-478); *Reid v. Memphis Publishing Co.*, 468 F.2d 346 (6th Cir. 1972); *Riley v. Bendix Corp.*, 464 F.2d 1113 (5th Cir. 1972); *Ward v. Allegheny Ludlum Steel Corp.*, 397 F. Supp. 375 (W.D. Pa. 1975); *Weitkenaut v. Goodyear Tire & Rubber Co.*, 381 F. Supp. 1284 (D. Vt. 1974); *Scott v. Southern Calif. Gas Co.*, 7 FEP Cases 1030 (C.D. Cal. 1973).

Other courts have reached a different conclusion. *E.g., Reid v. Memphis Publishing Co.*, 521 F.2d 512 (6th Cir. 1975); *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970); *Fischer v. Alsing*, 7 FEP Cases 220 (D. Ore. 1974); *Kettell v. Johnson & Johnson*, 337 F. Supp. 892 (E.D. Ark. 1972); *Dawson v. Mizell*, 325 F. Supp. 511 (E.D. Va. 1971).

This definition is grossly inadequate for it seemingly states that religion means religious observance and practice unless an employer cannot reasonably accommodate an employee without undue hardship. There is no definition whatsoever as to what constitutes "undue hardship."

In the absence of any Congressional standard, the courts have attempted to define "undue hardship." Religious discrimination in employment, prohibited by Title VII, has therefore been judicially determined on an *ad hoc* basis by converse definition: religious discrimination against the employee exists if undue hardship does not exist for the employer.[7]

As a consequence of the above, the state of the law is uncertain. The number of EEOC charges and the volume of litigation is increasing steadily. This Court's previous opinions dealing with Title VII prohibitions against sex and race discrimination are of little assistance when dealing with religious discrimination.[8]

[7] *E.g., Young v. Southwest S & L Ass'n*, 509 F.2d 140 (5th Cir. 1975); *Roberts v. Hermitage Cotton Mills*, 8 FEP Cases 319 (4th Cir. 1974); *Yott v. North Am. Rockwell*, 501 F.2d 398 (9th Cir. 1974); *Burns v. Southern Pac. Transp. Co.*, 11 FEP Cases 1441 (D. Ariz. 1976); *Ward v. Allegheny Ludlum Steel Corp.*, 397 F. Supp. 375 (W.D. Pa. 1975); *United States v. City of Albuquerque*, 10 FEP Cases 771 (D. N.M. 1975); *Olds v. Tennessee Paper Mills*, 11 FEP Cases 350 (E.D. Tenn. 1974); *Dixon v. Omaha Pub. Power Dist.*, 385 F. Supp. 1382 (D. Neb. 1974); *Weitkenaut v. Goodyear Tire & Rubber Co.*, 381 F. Supp. 1284 (D. Vt. 1974); *Cooper v. General Dynamics*, 378 F. Supp. 1258 (N.D. Tex. 1974); *Shaffield v. Northrop Worldwide Aircraft Servs. Inc.*, 373 F. Supp. 937 (M.D. Ala. 1974); *Fischer v. Alsing*, 7 FEP Cases 220 (D. Ore. 1974); *Drum v. Ware*, 7 FEP Cases 269 (W.D. N.C. 1974); *Bradington v. International Business Machs. Corp.*, 360 F. Supp. 845 (D. Md. 1973) *aff'd.* 492 F.2d 1240 (4th Cir. 1974); *Claybaugh v. Pacific Northwest Bell Tel. Co.*, 355 F. Supp. 1 (D. Ore. 1973); *Dawson v. Mizell*, 325 F. Supp. 511 (E.D. Va. 1971).

A review of the case law on religious discrimination indicates that each case is judged on its specific facts. Factors deemed relevant include: 1. The religious needs of the employee; 2. The skills utilized or job performed by that employee; 3. The operational requirements of the employer's business; 4. The size of the employer's work force; 5. The number of employees having similar skills or performing similar tasks to that of the employee; 6. The existence of a collective bargaining agreement; 7. The availability of other employees with similar skills; 8. The operational necessity of having that employee's task performed in his absence; 9. The effect of accommodation on other employees.

See generally, P. Kamper, *Religion and the Constitution* (1964); Edwards and Kaplan, Religious Discrimination and the Role of Arbitration under Title VII, 69 Mich. L. Rev. 599 (1971); Annot., 22 A.L.R. Fed. 580 (1975); Note, Religious Observance and Discrimination in Employment, 22 Syracuse L. Rev. 1019 (1971).

The great importance of the questions presented and the vast effect of their resolution certainly constitute "special and important reasons," within the context of Supreme Court Rule 19(1), for the issuance of a writ of certiorari by this Court to review the decision of the Eighth Circuit.

II. The Eighth Circuit Decision Is in Conflict With the Decisions of Other Courts of Appeal

This Court, pursuant to Supreme Court Rule 19(1)(b) should issue its writ of certiorari because of the conflict of the Eighth Circuit's *Hardison, supra,* opinion with the decision of other courts of appeal. In *Hardison* the Eighth Circuit specifically declined to follow the Sixth Circuit opinion rendered in *Reid v. Memphis Publishing Co.*, 521 F.2d 512 (1975).[9] *See Cum-*

[8] For example, while the Court's opinion in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), sets forth the respective burdens imposed upon both the complainant and an employer, the case does not lend itself to the facts which arise in the context of a religious discrimination suit.

[9] The Eighth Circuit stated:

> "In a second appeal, a different panel of the Sixth Circuit (Edwards, J., dissenting) seems to have receded from its prior holding that the regulation was consistent with the statute. *Reid v. Memphis Publishing Co.*, 521 F.2d 512 (6th Cir. 1975). We are more persuaded by the earlier opinion and by Judge Edwards' dissent." *Id.* at n. 5.

mins v. Parker Seal Co., 516 F.2d 544, 554 (6th Cir. 1975) (dissenting opinion), *petition for cert. filed*, 44 U.S.L.W. 3207 (U.S. Sept. 25, 1975) (No. 75-478).

Additionally the Eighth Circuit opinion is at odds with that of the Fifth Circuit in *Johnson v. United States Postal Serv.*, 497 F.2d 128 (1974), *aff'g* 364 F. Supp. 37 (N.D. Fla. 1973), and that of the Fourth Circuit in *Roberts v. Hermitage Cotton Mills*, 8 FEP Cases 319 (1974), *aff'g* 8 FEP Cases 315 (D. S.C. 1973). Both Johnson and Roberts, like Hardison, were members of the Worldwide Church of God and were discharged due to their inability to work on Saturdays. The Fifth and Fourth Circuits each upheld the lawfulness of the discharge and it is submitted that these opinions are irreconcilable with *Hardison*.

It is appropriate that this Court grant the petition for certiorari in order to resolve the inter-circuit conflict which has resulted and to prevent the continuance of inconsistent adjudications.

III. The Statutory Provision and Guideline at Issue Are Unconstitutional

This Court on innumerable occasions has reiterated the following principle enunciated in *Everson v. Board of Educ.*, 330 U.S. 1 (1947):

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. * * * In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'." *Id.* at 15-16.

Many jurists and commentators have questioned the constitutionality of the duty of reasonable accommodation mandated by Title VII § 701(j) and EEOC Regulation 1605.1(c), the legal sources for the imposition of this duty. In *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975) (dissenting opinion), the breach of the wall of separation was fully articulated:

> "By regulation 1605.1 and by 42 U.S.C. § 2000e(j) the Federal Government has breached the wall. The Regulation and Section 2000e(j) grant preferences to employees by reason of their religion, forcing modification of seniority systems, overtime scheduling and other forms of employee organization . . . .
>
> "Exemption from uniform work rules for religious reasons has been recognized as an unfair and undue preference under collective bargaining agreements. * * * [citations omitted]
>
> "Granting special privileges because of the exercise of one's religion is just as wrong as denying employment opportunity because of one's religious beliefs. When Government engages in either practice, it discriminates on the basis of religion and abandons its neutrality." *Id.* at 555-56.

The imposition of the duty of reasonable accommodation is violative of the establishment clause of the first amendment. The tripartite test enunciated in *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973), contains the applicable standard with which the provisions at issue must comply:

> "[T]o pass muster under the Establishment Clause the law in question, first must reflect a clearly secular legislative purpose, * * * second must have a primary effect that neither advances nor inhibits religion, * * * and, third, must avoid excessive government entanglement with religion. . . ." *Id.* at 773 [citations omitted]

The otherwise secular purpose of Title VII, the eradication of discrimination in employment, is contradicted by 42 U.S.C. § 2000e(j) and by Regulation 1605.1(c). These provisions are not neutral as they affect believers and non-believers; neither are they neutral in intent. In fact, insofar as they advance all religions, they are thereby violative of the establishment clause. *E.g., Lemon v. Kurtzman,* 403 U.S. 602 (1971); *Abington School Dist. v. Schempp,* 374 U.S. 203 (1963); *Illinois ex rel. McCullom v. Board of Educ.,* 333 U.S. 203 (1948); *Everson v. Board of Educ.,* 330 U. S. 1 (1947).

Secondly, these provisions must have a primary effect that neither advances nor inhibits religion and which is evenhanded in operation. *Gillette v. United States,* 401 U.S. 437, 450 (1971). A previous court, reviewing this aspect of the duty to reasonably accommodate properly stated:

> "To construe the Act as authorizing the adoption of Regulations which would coerce or compel an employer to accede to or accommodate the religious beliefs of all of his employees would raise grave constitutional questions of violation of the Establishment Clause of the First Amendment. It is settled that the Government, in its relations with religious believers and non-believers, must be neutral. The Government is without power to support, assist, favor or handicap any religion. [citations omitted]
>
> * * *
>
> No one disputes Dewey's right to his religious beliefs. The question is whether he has the right to impose his religious beliefs on his employer and interfere with the operation of its plant."

Dewey v. Reynolds Metals Co., 429 F.2d 324 at 334-35 (6th Cir. 1970).

This duty imposes its burden not only upon an employer but upon other employees in contravention of bona fide seniority or other contractual provisions which are themselves protected by 42 U.S.C. § 2000e-2(h).[10] Even in the absence of a collective bargaining agreement, employees either non-religious. or of different persuasions from that of the alleged discriminatee, are forced to assume the duties or responsibility of the alleged discrimination due to his religion. The preferential effect is obvious; the provisions favor the religious over the non-religious and advance particular religious. *Torcaso v. Watkins,* 367 U.S. 488 (1961); *Zorach v. Clauson,* 343 U.S. 306 (1952).

Third and lastly, the statute and regulation must avoid excessive government entanglement with religion. *Lemon v. Kurtzman,* 403 U.S. 602 (1971); *Walz v. Tax Comm'n,* 397 U.S. 664 (1970). These provisions necessarily violate this last criterion for both the EEOC and, subsequently, the courts are required to make a determination as to whether the affiliation or beliefs of the employee constitute a religion. Additionally, it must be decided by these tribunals whether the employee's beliefs are sincere. *See, e.g., Kettell v. Johnson & Johnson,* 337 F. Supp. 892 (E.D. Ark 1972); Comment, 44 Fordham L.Rev. 442, 449n.6 (1975). Further, as indicated by *Cummins v. Parker Seal Co.,* 516 F.2d 544, 559 (6th Cir. 1975) (dissenting opinion), there are innumerable instances in which an employee may

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[10] This section provides, in pertinent part:

> "Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of . . . religion. . . ."

See Jersey Cent. Power & Light Co. v. IBEW Local 327 et al., 508 F.2d 687 (3d Cir. 1975), *petition for cert. filed,* 44 U.S.L.W. 3084 (U.S. Aug. 1, 1975) (No. 75-182); *cf.* Edwards and Zaretsky, Preferential Remedies for Employment Discrimination, 74 Mich. L. Rev. 1 (1975).

seek an accommodation of any "aspect of religious observance and practice, as well as belief" within the context of 42 U.S.C. § 2000e(j).[11]

CONCLUSION

For the above reasons this Honorable Court should issue its writ of certiorari to review the decision of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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[11] *E.g., Young v. Southwest S & L Ass'n*, 509 F.2d 140 (5th Cir. 1975) [atheist objected to prayer conducted at employee meetings]; *Yott v. North Am. Rockwell*, 501 F.2d 398 (9th Cir. 1974) [religious objection of employee to payment of union dues]; *Weitkenhaut v. Goodyear Tire & Rubber Co.*, 381 F. Supp. 1284 (D. Vt. 1974) [church minister's need to attend meetings]; *Abdush-Shadid v. Narcotics Comm'n*, 12 FEP Cases 136 (Sup.Ct. N.Y. 1975) [Muslim's dress requirements].

APPENDIX

United States District Court
Eastern District of Missouri
Eastern Division

William H. Blakely, Plaintiff, vs. Chrysler Corporation, and United Automobile, Aerospace and Agricultural Implement Workers of America, Local 136, Defendants.	No. 74-812 C (4)

OPINION

(Filed December 31, 1975)

Plaintiff William H. Blakely brought this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, alleging that defendants, Chrysler Corporation and United Auto Workers Local 136, had discriminated against plaintiff on account of his religion.

This case was tried before the Court without a jury. The Court having considered the pleadings, the testimony of the witnesses, the documents in evidence, the stipulations of the parties, and being fully advised in the premises, hereby makes the following findings of fact and conclusions of law as required by Rule 52, Federal Rules of Civil Procedure:

Findings of Fact

1. Plaintiff, William H. Blakely, is a resident of the State of Missouri and was during all times relevant herein a citizen of the United States.

2. Defendant Chrysler Corporation is a corporation organized and existing under the laws of the State of Delaware, qualified to do business in Missouri. Defendant Chrysler Corporation is engaged in industry affecting commerce which, at all times material to this action, employed more than twenty-five persons during each week of the calendar year and is an employer within the meaning of 42 U.S.C. § 2000e(b).

3. Defendant Local 136, United Automobile, Aerospace and Agricultural Implement Workers of America was a labor organization in an industry affecting commerce at all times material to this action, within the meaning of 42 U.S.C. § 2000e(d).

4. Plaintiff was an employee of defendant Chrysler Corporation from February 15, 1965 to July 7, 1972 and worked in Department 9150, the Trim Department, at all times material herein. During this entire period, plaintiff was a member of defendant Local 136. Local 136 is the certified collective bargaining representative of production and maintenance employees at defendant Chrysler's St. Louis Car Assembly Plant.

5. In February, 1971, plaintiff was baptized as a member of the Worldwide Church of God. This Church observes the weekly Sabbath between sundown Friday and sundown Saturday. In addition, the Church observes various Holy Days throughout the year which commence at sundown on the day prior to the date of the Holy Day and continue until the following sundown. During this period, no work may be performed. Since his baptism, plaintiff has not worked on any of his Sabbaths or Holy Days. It is clear that the Worldwide Church of God is an established Church and that plaintiff held his beliefs sincerely.

6. The regular work schedule at Chrysler's plant was Monday through Friday for eight hours per day, and Saturday work, as overtime. Department 9150 had a quota system, where a certain number of employees could be excused from work on any day, including Saturday. Extra employees were available to replace the excused employees. The quota system was the result of negotiations between the two defendants herein.

7. Plaintiff did not work on August 10, 1971. On August 17, 1971, plaintiff received a written warning for his absence. Plaintiff had given as a reason for the absence that he had attended a Church meeting. Defendant Chrysler had stated, however, that the reason was not acceptable.

8. Plaintiff was absent from work on September 20, 1971, that being one of the Holy Days. As a result of the absence, plaintiff received a one-day disciplinary lay-off. Through intervention by defendant Local 136, however, defendant Chrysler agreed to waive the penalty.

9. Plaintiff received a one-day disciplinary lay-off because of an absence on September 29, 1971.

10. Plaintiff subsequently received a one-day disciplinary lay-off for an absence on Saturday, May 6, 1972. Defendant Local 136 filed a grievance concerning this matter which was appealed to an appeal board, the UAW-Chrysler Appeal Board, in Detroit. The International Union, who was responsible for the grievance at this stage of the grievance procedure, withdrew the appeal after plaintiff was discharged.

11. Plaintiff received a three-day disciplinary lay-off for an absence on Saturday, June 17, 1972. Although Local 136 succeeded in persuading defendant Chrysler to waive the penalty, plaintiff insisted on serving it.

12. On Saturday, June 24, 1972, plaintiff was absent from work. As a result, plaintiff received a five-day disciplinary lay-off. This lay-off was never assessed because plaintiff was discharged. Local 136 did not grieve the lay-off but instead instituted a grievance concerning the discharge itself.

13. Plaintiff had informed his foreman, Jack Stocker, that he would be absent on the dates involved because of his religious observances. Plaintiff had explained his religious beliefs and observances to both company and union personnel. Plaintiff was told by Bill Sanson, his general foreman, that if his religion interfered with his job, he should get another job.

14. Chrysler Corporation had a graduated disciplinary system concerning unexcused absences as follows: Two counselings; one verbal warning; one written warning; a one-day suspension; a three-day suspension; two five day suspensions; and finally, discharge. As to other actions, however, immediate discharge may be imposed. Chrysler posts Rules of Good Conduct, which provide in relevant part as follows:

> Chrysler employees are expected to conduct themselves on Corporation time or premises in a manner that promotes the safety and welfare of employees, encourages congenial work habits, and protects personal and corporation property. Misconduct may result in disciplinary action ranging from reprimand to discharge. Some examples of misconduct, which are not all inclusive, are listed below . . .
>
> 6. Failure or refusal to follow the instructions of supervision . . .
>
> 20. Unauthorized use of Corporation records or confidential information of any kind . . .

15. The evidence establishes that the union, in national negotiations, had tried to change Rule 20, to no avail.

16. As the disciplinary lay-offs were imposed upon plaintiff, he was shown a copy of a supervisor's report concerning his absences. Following the May, 1972 lay-off, plaintiff had requested a copy of the report and had informed his foreman that his purpose was to show it to the federal government, presumably the Equal Employment Opportunity Commission with whom plaintiff had discussed the situation. Both his foreman and the superintendent, Mr. Burke, and his steward, William Lewis, told plaintiff that he could not have a copy. No one informed plaintiff that he could make a handwritten copy of the report.

17. On July 7, 1972, when plaintiff was given his five-day disciplinary lay-off, he again requested a copy of the supervisor's report. The request was denied. Plaintiff then took the report from the supervisor. Plaintiff's foreman and his supervisor directed plaintiff to return the report but plaintiff refused. The union's chief steward and committeeman for the department were summoned and they tried unsuccessfully to get plaintiff to return the document. Plaintiff left the premises to make a copy and returned the report to the company within a short period of time on the same day. Plaintiff had indicated throughout that this was what he intended to do with the report. In his absence, the union committeeman commented that plaintiff was always causing problems with his religious beliefs.

18. Local 136, on its own initiative, filed a grievance protesting plaintiff's discharge. The union processed it through each of the first three steps of the grievance procedure. Defendant Chrysler denied the grievance at these stages. Local 136, in accordance with the grievance procedure, then appealed to the International Union who sent the grievance to the UAW-Chrysler Appeal Board in Detroit. Negotiations at this stage resulted in a settlement agreement that plaintiff would be reinstated with full seniority but without back pay. Plaintiff, believing that he was entitled to back pay and to have his record clear of the disciplinary lay-offs, rejected the settlement. Because of a problem with new addresses, plaintiff did not reject this settlement offer until May, 1974. There is no evidence from which to infer that had plaintiff accepted the offer he would be precluded from further pursuing his rights as to back pay.

19. The evidence is clear that plaintiff was discharged for violations of Rules 6 and 20. The Court finds, however, that the decision to discharge plaintiff for violation of these rules resulted solely from defendant Chrysler's feelings that plaintiff's religious beliefs caused it inconvenience.

20. The evidence establishes that Local 136 filed grievances on plaintiff's behalf and pursued them as far as possible. The grievances were dismissed as lacking merit only when they had reached the stage in the grievance procedure over which Local 136 had no control. Although there is evidence which indicates antagonism on the part of union personnel towards plaintiff's religious beliefs, the Court finds that this antagonism did not contribute to plaintiff's discharge, nor did it amount to a violation of the union's duty toward plaintiff.

21. The Court further finds that plaintiff would have earned a total of $17,179.60 from the date of discharge through May, 1974 when plaintiff rejected the offer of reinstatement. During that period, plaintiff earned $7,312.08, leaving a total of $9,867.52 in back pay lost. The Court finds that plaintiff could have accepted the offer of reinstatement, which would have mitigated his damages, without having lost the right to pursue his claims as to back pay.

22. Plaintiff's attorneys expended 141 hours in the preparation and presentation of plaintiff's case. The Court finds the reasonable value of such services to be $3,300.00.

23. Following his discharge, plaintiff filed a timely complaint with the Equal Employment Opportunity Commission and upon receipt of a Right to Sue letter, timely filed suit in this Court.

Conclusions of Law

This Court has jurisdiction over the subject matter and of the parties to this action in accordance with 42 U.S.C. §2000e-5(f)(3).

The Court has found that plaintiff's discharge was the result of antagonism felt by defendant Chrysler Corporation towards plaintiff's religious beliefs. It is clear that Title VII has been violated by defendant Chrysler Corporation. 42 U.S.C. § 2000e-2.

Chrysler Corporation has failed to establish that an accommodation of plaintiff's religious beliefs would have constituted an undue hardship so as to relieve defendant of the duty of accommodation. *Hardison v. Trans World Airlines, Inc.*, No. 74-1424 (8th Cir., December 16, 1975); *Johnson v. United States Postal Service*, 497 F.2d 128 (5th Cir. 1974). To the contrary, the evidence establishes that defendant made no effort whatsoever to accommodate plaintiff's religious practices. The evidence is also clear that such accommodation was entirely feasible since a quota system for absences existed, with extra personnel available as replacements. See *United States v. City of Albuquerque*, 10 F.E.P. 771, 780 (D.C.N.M. 1975). There was no evidence whatsoever that plaintiff could not be replaced on the days involved without an undue hardship to defendant Chrysler Corporation.

Nor is there any evidence which would indicate that plaintiff refused to cooperate in attempting an accommodation. The duty is on the employer to accommodate the employee's religious observances. *Claybaugh v. Pacific Northwest Bell Telephone Company*, 355 F.Supp. 1 (D.C. Ore. 1973). "Before an employer can assert the defense of non-cooperation, it is incumbent upon it to establish the accommodation *which it has tendered* and with which the employee refused to cooperate."

Hardison v. Trans World Airlines, Inc., supra, at 11 [emphasis added].

It is clear that a union may also be held liable for violations of Title VII. This liability arises if the union

> purposely acts or refuses to act in a manner which *prevents* or *obstructs* a reasonable accommodation by the employer so as to cause the employer to discriminate. *Hardison v. Trans World Airlines, Inc., supra,* at 19 [emphasis added].

The evidence fails to establish that Local 136 violated this duty owed to plaintiff. The union promptly filed and properly pursued the grievances filed, as far as was possible. The union on its own filed a grievance concerning plaintiff's discharge. This grievance did not assert religious discrimination as a grounds for the grievance. The Court can not conclude, however, that this amounted to a breach of the duty the union owed to plaintiff. Plaintiff did not ask union personnel to file this grievance on his behalf, nor did he tell them that he believed his discharge to be the result of religious discrimination. Under these circumstances, the union can not be held liable for failure to assert religious discrimination as a grounds for discharge. There is no evidence which shows that the union acted or refused to act so as to prevent or obstruct an accommodation by the employer. Therefore, there can be no liability.

Judgment will be entered in accordance with this opinion.

JOHN F. NANGLE
United States District Judge

Dated: December 31, 1975.

Supreme Court, U. S.
FILED
JAN 14 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1126

TRANS WORLD AIRLINES, INC.,
Petitioner,
vs.
LARRY G. HARDISON, ET AL.

No. 75-1385

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS,
AFL-CIO, ET AL.,
Petitioners,
vs.
LARRY G. HARDISON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONS FOR WRITS OF CERTIORARI FILED FEBRUARY 9, 1976 AND MARCH 29, 1976
CERTIORARI GRANTED NOVEMBER 15, 1976

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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Decision of Eighth Circuit, December 16, 1975 246

RELEVANT DOCKET ENTRIES

Feb. 10, 1972 Complaint—filed.

Mar. 1, 1972 Answer of International Association of Machinists and Aero Space Workers District 142—Filed.

Mar. 1, 1972 Answer of International Association of Machinists and Aero Space Workers Local 1650—Filed.

Mar. 2, 1972 Separate answer of defendant Trans World Airlines, Inc.—Filed.

Mar. 30, 1972 Answer of International Association of Machinists and Aero Space Workers—Filed.

Apr. 5, 1972 Interrogatories to plaintiff by defendant District 142 and defendant Local 1650—Filed.

Jul 12, 1972 Answers to interrogatories propounded by defendants District 142 and Local 1650—Filed by plaintiff. Submitted.

Oct. 17, 1972 Standard Pretrial Order No. 2—Filed.

Oct. 26, 1972 Stipulation of the Parties—filed

Nov. 8, 1972 Stipulation—filed.

Nov. 21, 1972 Stipulation—Filed. (Charles Riley was a non-union employee of Bendix Corporation and not covered by collective bargaining agreement.)

July 3, 1973 Suggested findings of fact by plaintiff—filed.

July 3, 1973 Suggested conclusions of law by plaintiff —filed.

July 19, 1973 Defendant Unions' response to plaintiff's suggested findings of fact and suggested conclusions

of law and defendant unions' suggested findings of fact and conclusions of law—Filed.

Jul 19, 1973 Defendant TWA's response to plaintiff's suggested findings of fact and suggested conclusions of law and defendant TWA's suggested additional findings of fact and suggested conclusions of law—Filed.

May 15, 1973 Memorandum and Order—Filed. (Title VII, 42 USC, §2000e-2(h) indicates that Congress did not intend that unions or employers be required to take actions that would impinge upon bona fide seniority systems. The Court finds that neither TWA nor any of the three (3) unions violated Title VII of the Civil Rights Act of 1964 by reason of its discharge of plaintiff for his refusal to work on his Sabbath. The Clerk of the Court is hereby Ordered to enter judgment for the defendants. JWO) Copies to counsel.

May 17, 1973 Notice of Appeal—filed. Copies mailed to counsel.

December 16, 1975 Decision of United States Court of Appeals for the Eighth Circuit.

January 19, 1976 Stay of Mandate by United States Court of Appeals for the Eighth Circuit

February 9, 1976 Petition for Writ of Certiorari in No. 75-1126

March 8, 1976 Order Extending time to file Petition for Writ of Certiorari (No. A-763)

March 29, 1976 Petition for Writ of Certiorari in No. 75-1385

November 15, 1976 Order of Supreme Court Granting Certiorari

COMPLAINT

(Filed February 10, 1972)

COMES NOW plaintiff and for his Cause states:

1. That plaintiff is a resident of Kansas City, Jackson County, Missouri, which is within this Judicial District; that defendant, Trans World Airlines, Inc., is a corporation authorized to do business in Missouri, with a principal office located in this Judicial District, and defendant, Trans World Airlines, Inc., being an "employer" as defined in Title 42 U.S.C., Section 2000e; that defendant, International Association of Machinists and Aero Space Workers, and District 142 and Local 1650 of the International Association of Machinists and Aero Space Workers are unincorporated labor organizations having officers and agents for management of said labor organizations representation of their member employees in this Judicial District.

2. Jurisdiction of this Court is invoked pursuant to Section 706 of the Civil Rights Act of 1964, Titled 42 U.S.C. 2000e-5(e). Jurisdiction of this Court is further invoked pursuant to 28 U.S.C. 1343.

3. This is a proceeding for a permanent injunction restraining defendant, Trans World Airlines, Inc. from maintaining a policy, practice, custom and usage of withholding, denying or attempting to withhold or deny, and depriving or attempting to deprive, or discharge or attempting to discharge or otherwise interfering with the employment of the plaintiff on the ground of his religion. This is further a proceeding for a permanent injunction restraining all defendant labor organizations from the same activity as aforesaid regarding defendant Trans World Airlines, Inc., and further to enjoin them from engaging in unlawful employment practice for a labor organization by

discriminating against plaintiff because of his religion, by failing to discharge their duty towards the plaintiff as a member of their labor organization because of his religion, and by acting in such a manner as to deprive or tend to deprive the plaintiff of an employment opportunity with defendant Trans World Airlines, Inc., and any and all activity that would otherwise adversely affect his status as an employee of Trans World Airlines, Inc. Further, this is also a proceeding for other equitable relief as the Court may deem proper and for legal relief to be afforded the plaintiff due to the religious discrimination of all defendants herein.

4. That plaintiff is a member of a religion which observes the Sabbath from Friday at sunset until Saturday at sunset.

5. That plaintiff was employed by defendant Trans World Airlines, Inc. from June 5, 1967 until he was discharged by defendant Trans World Airlines, Inc. on April 2, 1969; that plaintiff informed defendant Trans World Airlines, Inc. of his religious beliefs on or before October 11, 1968, after accepting said beliefs on or about September, 1968; that subsequent to March, 1969, defendant Trans World Airlines, Inc., discriminated against plaintiff by reason of his religion and discharged plaintiff on April 2, 1969. Said conduct on the part of defendant Trans World Airlines, Inc. all being in violation of Title 42 U.S.C. Section 2000e-2.

6. Defendant International Association of Machinists and Aero Space Workers, and defendants District 142 and Local 1650 of the International Association of Machinists and Aero Space Workers, discriminated against plaintiff because of his religious beliefs in failing to negotiate, assist, or correct the discriminatory policies of defendant Trans World Airlines, Inc. The said labor organizations cooperated, acted in concert, and assisted defendant Trans World Airlines, Inc. in their discharge of the plaintiff. The said conduct on the part of all defendants herein being in violation of Title 42 U.S.C. Section 2000e-2.

7. On or about October 28, 1969, the Equal Employment Opportunity Commission (E.E.O.C.) assumed jurisdiction of plaintiff's timely and proper complaint (Exhibit A) which alleged denial by all defendants herein of plaintiff's rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e, et seq. That plaintiff filed his administrative charge with the E.E.O.C. within 210 days after the unlawful employment practice by all defendants occurred, and that plaintiff requested a "Notice of Right to Sue Letter" which was mailed to him on January 11, 1972. This civil action in this Court is now being brought against all defendants herein, all of said procedures being in compliance with Title 42 U.S.C. 2000e et seq.

8. By reason of the aforesaid religious discrimination against the plaintiff in violation of the applicable statutes, by all defendants herein, plaintiff has suffered a loss of wages and benefits in the amount paid by the defendant Trans World Airlines, Inc., to said such employees for such position as occupied by that of the plaintiff, and plaintiff has been damaged in an amount to be determined by this Court.

WHEREFORE, plaintiff respectfully prays this Court:
1. That a permanent injunction issue enjoining defendant, Trans World Airlines, Inc., its agents, successors, employees, attorneys, and those acting in concert with it and at its direction from continuing or maintaining the policy, practice, custom and usage of denying, abridging, withholding, conditioning, limiting, or otherwise interfering with

the right of plaintiff to be employed by defendant Trans World Airlines, Inc. on the basis of merit rather than that of religion, and the right to equal employment opportunities as secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e et seq.

2. That a permanent injunction issue enjoining all defendant labor organizations, International Association of Machinists and Aero Space Workers, and District 142 and Local 1650 of the International Association of Machinists and Aero Space Workers, and their agents, successors, employees, attorneys, and those acting in concert with them and at their direction from continuing or maintaining the policy, practice, custom and usage of failing to adequately represent, denying, abridging, withholding, conditioning, limiting, or otherwise interfering with the right of plaintiff, including cooperation and assisting defendant Trans World Airlines, Inc. or any other employer in discriminating against the plaintiff, by reason of the fact that plaintiff believes in certain religious beliefs, and further that all labor organizations be enjoined from depriving plaintiff of the right to equal membership opportunities and equal employment opportunities as secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e et seq.

3. Award plaintiff all loss in wages and lost benefits which he suffered as a result of his discriminatory discharge from defendant Trans World Airlines, Inc., and prays that the Court order such affirmative relief and action as may be appropriate and the Court may deem proper.

4. Allow plaintiff his costs herein including reasonable attorney's fees and other additional relief as may appear to the Court equitable and just.

Exhibit A

...as soon as possible. It must be mailed within 30 days after the discriminatory act took place. (See addresses on back page)

...on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Case File No. TLC00061

(PLEASE PRINT OR TYPE)

1 Your Name (Mr., Mrs., Miss, indicate) XXXXXX Larry Glenn Hardison — Phone Number 483-6263
Street Address 5017 Thompson--Apt. 3
City Kansas City — State Missouri — Zip Code 64124

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)
Race or Color ☐ Religious Creed ☒ National Origin ☐ Sex ☐

3 Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprentice committee. If more than one, list all.
Name Trans World Airlines
Street Address Kansas City International Airport
City Kansas City — State Missouri — Zip Code 64100
AND (other parties if any) International Association of Machinists and Aero Space Workers
Vivion Road & Cliffview Drive
Riverside, Missouri

4 Have you filed this charge with a state or local government agency? Yes ☐ When ___ (Month, Day, Year) No

5 If your charge is against a company or a union, how many employees or members? Over 25 ☐ Over 50 ☒

6 The most recent date on which this discrimination took place Month April Day 2 Year 1969

7 Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary)
On June 5, 1967 I was hired by T.W.A. as a stores clerk. About September 1968 I accepted a religous faith which observes Friday sunset to Saturday sunset as the Christian Sabbath. I immediately approached the company with this information. I contacted not only my immediate supervisor but also Mr. Everett Kussman, Supervisor System Stores, about my religous convictions.
Prior to October 1968 I was able to schedule, through seniority preference, my ... week so that I'd be able to observe the Sabbath. On October 4th I wrote Mr. Kussman a letter advising him of my new schedule, and that I would provide him a list of annual days that I would require off for religous purposes which we discussed at our previous meetings. (PLEASE SEE ENCLOSURE # 1)
During the time between October '68 and March '69 I had transfered to a different (still in Stores), and in the engine overhaul building. During the month of February vacation were scheduled. The man with lowest seniority scheduled his vacation for ... 3rd thru March 14th. When his vacation came due Mr. K. Kussman called me to his office ... (CONTINUED ON SEPARATE SHEET)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.
(Signature)
Subscribed and sworn to before me this ... day of ... 196...
(Notary)
You should contact a Notary Public ... when you want to sign this form. ... will be

EXHIBIT "A"

BEST COPY AVAILABLE

(As I would be required to work in his place. This man had Tuesday and Wednesday off and worked weekends,) Mr. Kussman and I discussed how to avoid my being required to work on the Sabbath, not whether I would or not as he already knew I was a Sabbath observer. A trade of shifts was mentioned but the union would not allow that, a change of sections was also brought up but again the union would not allow the company to transfer me. When the company was willing to avoid the Sabbath problem the union would not allow any reasonable solution therefore forcing the company into a postion which they wished to avoid. Therefore the union became discriminatory in not allowing the company to make arraingements for my Sabbath observance, nor did they at any time offer solutions to the problem , but coveted and protected their seniority system to the point of violating the law, and constituional rights we all hold dear.

On March the 8th I was scheduled to work. March the 6th I asked my supervisor for that day off, I was refused. The morning of March 8th I called in and told the duty storekeeper that I would not be in that day. Neither my regular supervisor nor the duty storekeeper had been informed by higher management that I was a Sabbath observer therefore compounding the problem.

On the 15th I was again scheduled to work to cover for vacation. At that time Mr. Richard Stewart had taken over Mr. Nicholson's position while he was on vacation. On approximately the 14th I had a discussion with Mr. Stewart, and requested the 15th off, I was refused. He instructed me that I would be considered insubordinate if I did not show up on the 15th. I asked him who he would I rather insubordinate T.W.A. or God, he gave me no answer. He then asked me if I would be in, I told him no I wouldn't. On the morning of the 15th I tried to call but no one answered. Admittedly I should have made a later call but I didn't, even though I had told Mr. Stewart I wouldn't be in.

On March 21st I was called into Mr. Butcher's office and told that if I did not work on the 22nd a discharge hearing would be held because of my insubordination. At that time I informed him of my religous convictions and that there could be no exceptions. He offered no solutions nor suggestions, nor did my union steward who also was in attendance nor did he charge that this would be religous discrimination if carried through. They (the company) did not condider religous beliefs an acceptable justification for absence. (PLEASE SEE ENCLOSURE # 2)

On March 22nd I was again scheduled to work, and on that morning I called in and informed the duty storekeeper that I would not be in.

On March the 25th I received a letter from Mr. Butcher charging me with insubordination and informing me of the date of my discharge hearing. (PLEASE SEE ENCLOSURE # 3)

On March the 31st the discharge hearing was held. My hearing officer was J.H.Frey, Mr. R. Shields of Industrial Relations was in attendance, as was the union greivance committee. The union did not defend my postion at the hearing. The only defence they made was to contest that discharge was too severe a penalty. No one brought up the fact that if I was found guilty and discharged, they (both the company and the union) would be violating the Civil Rights Law of 1964, and their contract with the government for their Cape Kennedy operations, and the many other federal and state laws on religous freedoms. At that time I did not know what would be violated if I was discharged, nor any time was I called on for testimony.

On April 2nd I was found guilty and discharged at the end of my shift. (PLEASE SEE ENCLOSURE # 4)

Approximately the 10th of April I called Industrial Relations for a letter of reference which I received. You will please note that it states I was let go ONLY because I would not work on certain days. The only days I will not work are those religous days observed by my faith. (PLEASE SEE ENCLOSURE # 5)

On August 19th I scheduled an appointment with Mr. R. Shields of T.W.A. Industrial Relations. We discussed the problem and I informed him that the discharge was illegal and discriminatory and requested rehire. He denied discrimination and refused to rehire me, therefore compounding and continuing their unfair and illegal actions.

ANSWER OF INTERNATIONAL ASSOCIATION OF MACHINISTS AND AERO SPACE WORKERS, DISTRICT 142

(Filed March 1, 1972)

For its answer to Plaintiff's Complaint, Defendant International Association of Machinists and Aero Space Workers, District 142 ("District 142") states

FIRST DEFENSE

1. Defendant District 142 admits that Plaintiff is a resident of Kansas City, Jackson County, Missouri, which is within this judicial district; Defendant District 142 admits that Defendant Trans World Airlines, Inc., is a corporation doing business in Missouri with a principal office located in this judicial district; Defendant District 142 admits that Defendant Trans World Airlines is an employer as defined in Title 42 U.S.C., Section 2000e; Defendant District 142 admits that it is an unincorporated labor organization having officers and agents who represent employees in this judicial district. Defendant District 142 admits that International Association of Machinists and Aero Space Workers, Local 1650 ("Local 1650") is a separate and distinct labor organization having officers and agents who represent employees in this judicial district. Defendant District 142 admits that the International Association of Machinists and Aero Space Workers ("International") is a separate and distinct labor organization with agents in this judicial district. Defendant District 142 denies each and every other allegation contained in Paragraph 1 of the Complaint.

2. Defendant District 142 admits that Plaintiff purports to bring this action pursuant to Section 706 of the

Civil Rights Act of 1964, Title 42 U.S.C. 2000e-5(e) and 28 U.S.C. 1343, but denies each and every other allegation contained in Paragraph 2 of the Complaint.

3. Defendant District 142 states that Paragraph 3 of the Complaint states legal conclusions and, accordingly, denies the same.

4. Defendant District 142 has no direct knowledge of the membership of Plaintiff in any religion or the sabbath which any such religion may observe.

5. Defendant District 142 admits Plaintiff was employed by Defendant Trans World Airlines from June 5, 1967 and was discharged by Defendant Trans World Airlines on or about April 2, 1969 but denies each and every other allegation contained in Paragraph 5 of the Complaint.

6. Defendant District 142 denies each and every allegation contained in Paragraph 6 of the Complaint.

7. Defendant District 142 states that the Plaintiff sent a document to the Equal Employment Opportunity Commission on August 25, 1969, against "International Association of Machinists and Aero Space Workers"; that said charge was deferred to the Missouri Commission on Human Rights on September 1, 1969, which dismissed the charge for lack of jurisdiction for failure to file within ninety days of the alleged act of discrimination on February 27, 1970 and that said charge was filed on or about November 18, 1969 with the Equal Employment Opportunity Commission. Defendant District 142 denies each and every other allegation contained in Paragraph 7 of the Complaint and states that Plaintiff failed to file timely charges with the Equal Employment Opportunity Commission and the Missouri Commission on Human Rights.

8. Defendant District 142 denies each and every allegation contained in Paragraph 8 of the Complaint.

SECOND DEFENSE

9. The Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

10. Plaintiff while employed by Defendant Trans World Airlines bid for jobs and schedules which he knew, or should have known, made it impossible for him to exercise his seniority to select the days he desired to be off work; Plaintiff thereafter failed and refused to cooperate with Defendant District 142 in processing his grievance. Plaintiff has therefore waived and is estopped to assert the claims made herein.

FOURTH DEFENSE

This Court lacks jurisdiction of the subject matter of this case since Plaintiff has not fully complied with the procedural requirements before the Equal Employment Opportunity Commission or the Missouri Commission on Human Rights in relation to Defendant District 142.

FIFTH DEFENSE

Plaintiff is barred from asserting the claims made herein since he did not exhaust his internal Union remedies or his rights to process his grievance under the Railway Labor Act.

WHEREFORE, Defendant District 142 prays that the Court (1) award Defendant District 142 its attorney fees as the prevailing party within the meaning of Title VII of the Civil Rights Act of 1964; and (2) allow Defendant District 142 to be discharged with its costs.

ANSWER OF INTERNATIONAL ASSOCIATION OF MACHINISTS AND AERO SPACE WORKERS, LOCAL 1650

(Filed March 1, 1972)

For its answer to Plaintiff's Complaint, Defendant International Association of Machinists and Aero Space Workers, Local 1650 ("Local 1650") states

FIRST DEFENSE

1. Defendant Local 1650 admits that Plaintiff is a resident of Kansas City, Jackson County, Missouri, which is within this judicial district; Defendant Local 1650 admits that Defendant Trans World Airlines, Inc., is a corporation doing business in Missouri with a principal office located in this judicial district; Defendant Local 1650 admits that Defendant Trans World Airlines is an employer as defined in Title 42 U.S.C, Section 2000e; Defendant Local 1650 admits that it is an unincorporated labor organization having officers and agents who represent employees in this judicial district. Defendant Local 1650 admits that International Association of Machinists and Aero Space Workers, District 142 ("District 142") is a separate and distinct labor organization having officers and agents who represent employees in this judicial district. Defendant Local 1650 admits that the International Association of Machinists and Aero Space Workers ("International") is a separate and distinct labor organization with agents in this judicial district. Defendant Local 1650 denies each and every other allegation contained in Paragraph 1 of the Complaint.

2. Defendant Local 1650 admits that Plaintiff purports to bring this action pursuant to Section 706 of the Civil Rights Act of 1964, Title 42 U.S.C. 2000e-5(e) and

28 U.S.C. 1343, but denies each and every other allegation contained in Paragraph 2 of the Complaint.

3. Defendant Local 1650 states that Paragraph 3 of the Complaint states legal conclusions and, accordingly, denies the same.

4. Defendant Local 1650 has no direct knowledge of the membership of Plaintiff in any religion or the sabbath which any such religion may observe.

5. Defendant Local 1650 admits Plaintiff was employed by Defendant Trans World Airlines from June 5, 1967 and was discharged by Defendant Trans World Airlines on or about April 2, 1969 but denies each and every other allegation contained in Paragraph 5 of the Complaint.

6. Defendant Local 1650 denies each and every allegation contained in Paragraph 6 of the Complaint.

7. Defendant Local 1650 states that the Plaintiff sent a document to the Equal Employment Opportunity Commission on August 25, 1969, against International Association of Machinists and Aero Space Workers; that said charge was deferred to the Missouri Commission on Human Rights on September 1, 1969 which dismissed the charge for lack of jurisdiction for failure to file within ninety days of the alleged act of discrimination on February 27, 1970 and that said charge was filed on or about November 18, 1969, with the Equal Employment Opportunity Commission. Defendant Local 1650 denies each and every other allegation contained in Paragraph 7 of the Complaint and states that Plaintiff failed to file timely charges with the Equal Employment Opportunity Commission and the Missouri Commission on Human Rights.

8. Defendant Local 1650 denies each and every allegation contained in Paragraph 8 of the Complaint.

SECOND DEFENSE

9. The Complaint fails to state a claim upon which relief can be granted against Defendant Local 1650.

THIRD DEFENSE

10. Plaintiff while employed by Defendant Trans World Airlines bid for jobs and schedules which he knew, or should have known, made it impossible for him to exercise his seniority to select the days he desired to be off work; Plaintiff thereafter failed and refused to cooperate in processing his grievance. Plaintiff has therefore waived and is estopped to assert the claims made herein.

FOURTH DEFENSE

This Court lacks jurisdiction of the subject matter of this case since Plaintiff has not fully complied with the procedural requirements before the Equal Employment Opportunity Commission or the Missouri Commission on Human Rights in relation to Defendant Local 1650.

FIFTH DEFENSE

Plaintiff is barred from asserting the claims made herein since he did not exhaust his internal Union remedies or his rights to process his grievance under the Railway Labor Act.

WHEREFORE, Defendant Local 1650 prays that the Court (1) award Defendant Local 1650 its attorney fees as the prevailing party within the meaning of Title VII of the Civil Rights Act of 1964; and (2) allow Defendant Local 1650 to be discharged with its costs.

SEPARATE ANSWER OF DEFENDANT TRANS WORLD AIRLINES, INC.

(Filed March 2, 1972)

Comes now defendant Trans World Airlines, Inc. and for its answer to plaintiff's complaint, alleges and states as follows:

First Defense

1. Plaintiff's complaint fails to state a claim against Trans World Airlines, Inc. upon which relief can be granted.

Second Defense

2. It admits the allegations contained in paragraph 1 of plaintiff's complaint.

3. It denies each and every allegation contained in paragraphs 2 and 3 of plaintiff's complaint.

4. It states that this defendant is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 4 of plaintiff's complaint.

5. It denies each and every allegation contained in paragraph 5 of plaintiff's complaint, except it admits that plaintiff was employed by this defendant from June 5, 1967 until he was discharged on April 2, 1969.

6. It denies each and every allegation contained in paragraph 6 of plaintiff's complaint.

7. It denies each and every allegation contained in paragraph 7 of plaintiff's complaint, except it admits that the Equal Employment Opportunity Commission received an administrative charge from the plaintiff and that plaintiff requested a "Notice of Right to Sue Letter" which was mailed to him by the E.E.O.C. January 11, 1972.

8. It denies each and every allegation contained in paragraph 8 of plaintiff's complaint.

Third Defense

9. This court lacks jurisdiction over the subject matter of plaintiff's complaint for the reason that plaintiff failed to comply with the procedures required by Title 42 U.S.C. §2000e et seq.

Fourth Defense

10. Plaintiff failed to exhaust his administrative remedy under the collective bargaining agreement between TWA and the International Association of Machinists and Aero Space Workers as required by the Railway Labor Act (45 U.S.C. §151 et seq. §181 et seq.).

WHEREFORE, having fully answered plaintiff's complaint, defendant Trans World Airlines, Inc. prays that said complaint be dismissed and for its costs herein incurred and expended.

ANSWER OF INTERNATIONAL ASSOCIATION OF MACHINISTS AND AERO SPACE WORKERS

(Filed March 30, 1972)

For its answer to Plaintiff's Complaint, Defendant International Association of Machinists and Aero Space Workers, states that its true and correct name is "The Grand Lodge of the International Association of Machinists and Aerospace Workers" (hereinafter the International) and for its answer states

FIRST DEFENSE

1. Defendant International states that it has not been properly served with process pursuant to F.R.C.P. 4 in that the Court lacks jurisdiction over its person under F.R.C.P. 12(b)(2) since there has been insufficient service of process under F.R.C.P. 12(b)(5).

SECOND DEFENSE

2. Defendant International admits that Plaintiff is a resident of Kansas City, Jackson County, Missouri, which is within this judicial district; Defendant International admits that Defendant Trans World Airlines, Inc., is a corporation doing business in Missouri with a principal office located in this judicial district; Defendant International admits that Defendant Trans World Airlines is an employer as defined in Title 42 U.S.C., Section 2000e; Defendant International admits that it is an unincorporated labor organization having officers and agents who represent employees in this judicial district. Defendant International admits that International Association of Machinists and Aero Space Workers, District 142 ("District 142") is a separate and distinct labor organization having officers and agents who represent employees in this judicial district. Defendant International admits that the International Association of Machinists and Aero Space Workers Local 1650 ("Local 1650") is a separate and distinct labor organization with agents in this judicial district. Defendant International denies each and every other allegation contained in Paragraph 1 of the Complaint.

3. Defendant International admits that Plaintiff purports to bring this action pursuant to Section 706 of the Civil Rights Act of 1964, Title 42 U.S.C. 2000e-5(e) and

28 U.S.C. 1343, but denies each and every other allegation contained in Paragraph 2 of the Complaint.

4. Defendant International states that Paragraph 3 of the Complaint states legal conclusions and, accordingly, denies the same.

5. Defendant International has no direct knowledge of the membership of Plaintiff in any religion or the sabbath which any such religion may observe.

6. Defendant International admits Plaintiff was employed by Defendant Trans World Airlines from June 5, 1967 and was discharged by Defendant Trans World Airlines on or about April 2, 1969 but denies each and every other allegation contained in Paragraph 5 of the Complaint.

7. Defendant International denies each and every allegation contained in Paragraph 6 of the Complaint.

8. Defendant International states that the Plaintiff sent a document to the Equal Employment Opportunity Commission on August 25, 1969, against International Association of Machinists and Aero Space Workers; that said charge was deferred to the Missouri Commission on Human Rights on September 1, 1969 which dismissed the charge for lack of jurisdiction for failure to file within ninety days of the alleged act of discrimination on February 27, 1970 and that said charge was filed on or about November 18, 1969, with the Equal Employment Opportunity Commission. Defendant International denies each and every other allegation contained in Paragraph 7 of the Complaint and states that Plaintiff failed to file timely charges with the Equal Employment Opportunity Commission and the Missouri Commission on Human Rights.

9. Defendant International denies each and every allegation contained in Paragraph 8 of the Complaint.

THIRD DEFENSE

10. The Complaint fails to state a claim upon which relief can be granted against Defendant International.

FOURTH DEFENSE

11. Plaintiff while employed by Defendant Trans World Airlines bid for jobs and schedules which he knew, or should have known, made it impossible for him to exercise his seniority to select the days he desired to be off work; Plaintiff thereafter failed and refused to cooperate in processing his grievance. Plaintiff has therefore waived and is estopped to assert the claims made herein.

FIFTH DEFENSE

This Court lacks jurisdiction of the subject matter of this case since Plaintiff has not fully complied with the procedural requirements before the Equal Employment Opportunity Commission or the Missouri Commission on Human Rights in relation to Defendant International.

SIXTH DEFENSE

Plaintiff is barred from asserting the claims made herein since he did not exhaust his internal Union remedies or his rights to process his grievance under the Railway Labor Act.

WHEREFORE, Defendant International prays that the Court (1) dismiss the case against the International or in lieu thereof quash service against it for the reasons stated in Defendant International's First Defense and/or (2) award Defendant International its attorney fees as the prevailing party within the meaning of Title VII of the Civil Rights Act of 1964; and (3) allow Defendant International to be discharged with its costs.

STANDARD PRETRIAL ORDER NO. 2

(Filed October 17, 1972)

Following pretrial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Rule 20 of this Court,

IT IS ORDERED:

I. *This as an action for:* This is an action by an individual Plaintiff against his former employer, Trans World Airlines ("TWA") and three labor organizations ("Local 1650", "District 142", and "The International") seeking redress from alleged religious discrimination in violation of the Civil Rights Act of 1964, as set forth in Plaintiff's Complaint filed February 10, 1972. All such discrimination has been denied by each and every Defendant in separate answers which also raised certain affirmative defenses.

II. *Federal Jurisdiction is Involved Upon the Ground:*

Plaintiff is a resident of Missouri and was a resident of this federal district at all material times, and the unlawful employment practice is alleged to have been committed at the TWA overhaul base, located within this judicial district. Defendant TWA is an employer engaged in interstate commerce and subject to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) ("Title VII"). Defendant Local 1650, Defendant District 142 and Defendant International is each a labor organization subject to the provisions of Title VII. Federal jurisdiction is sought on the basis of 42 U.S.C. 2000(e)(5)(f). Defendant International denies the Court's jurisdiction over it since it alleges it has not properly been served with process. All Defendants deny the Court's jurisdiction because they

allege Plaintiff has failed to follow procedural requirements established under Title VII, the Railroad Labor Act, contractual grievance machinery and internal union remedies, any one of which Defendants allege is a prerequisite to conferring the Court with jurisdiction in this case.

III. *The Following Facts are Admitted and Require No Proof*:

1. Plaintiff was employed by Defendant TWA on June 5, 1967 and terminated by TWA on April 2, 1969.

2. Plaintiff was a member of the International Association of Machinists and Aero-Space Workers, AFL-CIO and was employed at a geographic point where the TWA-IAM agreement was administered on a local level by Local 1650 and on a district level by District 142.

3. Plaintiff was a member of a religion which observes the Sabbath from Friday at sunset until Saturday at sunset at the time of his discharge by Defendant TWA on April 2, 1969.

4. Prior to Plaintiff's discharge by Defendant TWA, Plaintiff had informed Defendant TWA of his religious beliefs.

5. That during the period of time that Plaintiff was employed by Defendant TWA, his employment relationship with Defendant TWA was governed by a collective bargaining agreement between Defendant TWA and International Association of Machinists and Aero-Space Workers covering all mechanics and related employees, which was signed August 25, 1966. At the time Plaintiff was employed by TWA, the TWA-IAM agreement applied to and covered about fifteen thousand employees located at more than thirty-one geographic locations through the United States.

6. Trans World Airlines, Inc. is a common carrier engaged in the interstate transportation of passengers, cargo and mail pursuant to operating authority granted by the Civil Aeronautics Board. This authorization requires the rendition of a safe, efficient and adequate service in the public interest and Trans World Airlines, Inc. meets its obligation to perform this service by conducting operations on a seven day a week basis. For this purpose Trans World Airlines, Inc. employs approximately thirty-seven thousand employees at approximately one hundred locations.

A seven day a week operation depends upon support from a number of departments within Trans World Airlines, Inc., including the Stores Department at the overhaul base at Kansas City International Airport, Kansas City, Missouri. The work at the Stores Department includes the delivering of parts and materials to mechanics at the overhaul base for the purpose of repairing, maintaining and overhauling aircraft and engines. In addition to work on TWA's own fleet, TWA performs repair, maintenance and overhaul at said overhaul base for approximately thirty other airlines. All these activities require seven day a week support from the Stores Department at the overhaul base at Kansas City International Airport, Kansas City, Missouri.

7. Plaintiff was initially employed by Defendant TWA as a Stores Clerk in Building No. 1 at the Kansas City Overhaul Base.

8. On or about December 2, 1968 Plaintiff voluntarily bid to another stores clerk section in Building No. 2 at the overhaul base at Kansas City International Airport, Kansas City, Missouri. Building No. 1 Stores Stockroom Section and Building No. 2 Stores Progress Section are

two separate seniority groupings, and by bidding to the Building No. 2 section Plaintiff had less relative seniority within his new seniority grouping than he had previously had in the Building No. section. Within the Building No. 2 section Plaintiff became the second lowest man in order of seniority on the day shift, the man with the lowest seniority on that shift being an employee named Bill Wyatt. Plaintiff's title as Stores Clerk, his wages, benefits and duties remained the same.

In March, 1969 Bill Wyatt went on vacation. Normally when a weekend vacancy in a job in a Stores section is created by a vacation schedule, TWA management advises the IAM steward in that section of the vacancy. The application of the seniority provisions of the TWA/IAM agreement within that section would have resulted in Plaintiff being scheduled to work March 8, 1969 which fell on a Saturday. Wyatt's job entailed delivering parts and materials to mechanics in Building No. 2 for the repair and maintenance of aircraft engines. Wyatt had Tuesdays and Wednesdays off and worked weekends.

9. TWA Overhaul Base works on a twenty-four hour basis, with three shifts a day. The Store Department, where Plaintiff was employed, was open all year around, twenty-four hours a day.

10. When Plaintiff was employed at TWA, he received the contract between the Machinists and TWA. He also received a copy of the International Constitution, a copy of Local 1650's By-Laws, a copy of District 142's By-Laws, and he read them.

11. The Union was certified by the National Mediation Board on November 20, 1945, May 15, 1946 and September 3, 1949, in accordance with the provisions of Title II of the Railway Labor Act.

12. On Hardison's employment application dated February 27, 1967, the following question was asked and answered:

Q. "Are you willing to work shifts, including weekend?"

A. "Yes."

13. A member of the Worldwide Church of God officially becomes a member upon baptism, but the obligations for members are not different than for non-members who are studying to become members.

14. The Worldwide Church of God celebrates holidays known as:

(1) The First Day of Unleavened Bread;

(2) Last Day of Unleavened Bread;

(3) Pentecost;

(4) Feast of Trumpet;

(5) Day of Atonement;

(6) Feast of Tabernacles;

(7) Last Great Day.

All the holidays occur at different dates in reference to the Gregorian calendar. Those who practice the religion are not to work on these holidays.

15. The International Association of Machinists and Aero-Space Workers AFL-CIO is an international labor organization with over one million members in a large number of industries and geographic locations, both in the United States and foreign countries. It maintains its principal office in the Machinists Building, 1300 Connecticut Avenue, N.W., Washington, D. C. It has agents located within the State of Missouri and within this judicial dis-

trict, designated Grand Lodge Representatives. The officers of the International are elected by a vote of the entire Machinists' membership of approximately one and one-half million members. The International maintains its own treasury, hires and fires employees to work for it, and files reports in its name with the United States Government and other local and state governments.

16. District 142, International Association of Machinists and Aero-Space Workers, is a delegate body made up of representatives from approximately thirty-one locals located throughout the United States and is responsible for the representation, nationwide, of all employees in certain classifications employed by TWA and Ozark Airlines. In April 1969, there were approximately fifteen thousand TWA employees under District 142's jurisdiction at the time of Plaintiff's employment by TWA. District 142 at all material times has maintained its business offices at 206 Northeast 32nd Avenue, Kansas City, Missouri. The agent of 142 assigned to the Overhaul Base during the time this grievance arose was Joseph W. Bowman, Sr., Assistant General Chairman. The District officers are elected by employees whom they represent at TWA and Ozark Airlines. The District maintains its own offices and treasury, hires and fires its employees and files reports with the United States and other local and state governments.

17. Local 1650 represents and consists of employees employed by TWA and Ozark Airlines located at Kansas City, Missouri; Wichita, Kansas; and Louisville, Kentucky. There are more than five thousand employees who belong to Local 1650 at these locations, most of whom are employed by TWA in the Kansas City area. For about nine years Local 1650 has maintained its business office and main meeting hall at Vivion Road and Cliffview Drive

in Riverside, Missouri. Local 1650 elects its own officers, maintains a treasury in its own name, makes expenditures in its own name, files required reports in its own name with United States Government and other governmental agencies, hires and fires employees to work for it, conducts its own meetings, and runs its day-to-day affairs. The Local can take no action contrary to the International Constitution or District By-Laws, but in all other ways it runs its own affairs and makes its own decisions independently. The International, District and Local are each separate labor organizations and separate legal entities.

18. Stewards of Local 1650 are elected by members of 1650. They receive no pay from Local 1650, no pay from the District and no pay from the International for their duties as stewards. Stewards do receive reimbursement of their union dues from Local 1650 if they serve as stewards and attend one Local meeting per month and one steward meeting per month. At all material times, James Tinder and Earl Box were stewards or committeemen and agents of Local 1650.

19. Service was made on Local 1650 on February 11, 1972 at its offices at Vivion Road and Cliffview Drive, Riverside, Missouri. Service upon District 142 was made on February 22, 1972 at its office in Kansas City, Missouri. Purported service on the International was made on March 8, 1972 by serving a copy of the Complaint on James Tarwater, Vivion Road and Cliffview Drive, Riverside, Missouri, the address of Local 1650. James Tarwater is Financial Secretary of Local 1650.

20. On April 25, 1968, Plaintiff wrote the following note to Everett Kussmann, Manager of Store Systems:

> Would like to see you about a change in weekly days off. I wish to request either Friday and Saturday

off or from Friday sunset to Saturday sunset off with the hours taken off Friday to be worked on Saturday evening or Sunday. My reason is I sincerely believe this is the Sabbath and no servile work may be done then.

On April 27, 1968, Kussman wrote a note concerning Plaintiff's April 25, 1968 memo:

> Arrange for Mr. Hardison and his steward to see me S.A.P.

On May 3, 1968, Kussman wrote a memo to Burns Prater, a supervisor, as follows:

1. Agreed to steward seeking swap or days off.
2. Agreed to odd holidays (excused T.O.) if he works the Christian holiday when requested.
3. He advises you are getting him another job—agreed you should. Belongs to the 'World Wide Christian Church' Garner Ted Armstrong, Ambassador College, Pasadena, California.

On May 7, 1968, Prater wrote Kussman

> I haven't made any headway. His time off and day off requirement are too difficult to handle. I understand that no one would swap days off with him.

In the last part of September 1968, Plaintiff requested and received a conference with Kussman. James Tinder was also present.

21. By letter dated October 4, 1968 and received October 7, 1968, Plaintiff wrote to Kussman:

10-4-68

Attn: Mr. E. Kussman

Subj: Days Off

From: L. G. Hardison

Sir;

As per our conversation several months ago concerning certain religious days (annual), that I would be required to be off. You said that you would excuse me from work those days, when I could have the Sabbath off and be accepted into the church.

This is to inform you that I have finally transferred to 11-7 shift and now can observe the Sabbath. My enterance into the church will soon follow. I will, if you so wish, furnish you (or your designate), a list of those dates that I would need per year, beginning with the new year.

I would appreciate a reply, with any comments you wish to make.

Thank you for your sincere and understanding consideration and cooperation.

On October 11, 1969, Kussman wrote Plaintiff the following letter which verified the contents of the earlier meeting.

> I acknowledge with interest your letter of October 4 regarding our previous discussion relating to the requirement of your religious belief, particularly with relationship to holidays, both those provided by the contract and those observed by your religious convictions. In our previous discussion, I indicated a willingness to consider your specific holiday requirements for time off when possible and you in turn indicated

your willingness to volunteer for all contract provided holidays making yourself available for work. You recognized that I may not always be able to comply for reasons that may be beyond my control and I in turn recognized that you could only make yourself available for contract provided holidays, but that you may not be scheduled because of the union method of scheduling in turn.

I would appreciate, at your earliest convenience, a list of holidays that you refer to in your letter. I in turn will respond with a list. I am pleased that your shift change permits you to observe the sabbath. I wish you every success and happiness in your relationship with the church. You are probably aware that the company's response to your request has been assisted by your fine attitude.

On October 20, 1968, Hardison wrote to "Manager, System Stores":

The following is the previously discussed list of religious holidays that I must observe for 1969.

APRIL 3	SEPT 27	
APRIL 9	OCT 4	(SEE NOTE)
MAY 26		
SEPT 13		

NOTE: Sept. 27th, begins the Festival of Tabernacles which is a week long commanded assembly, ending Oct. 3rd. October 4th is The Last Great Day on which I can do no work. But it happens to fall on one of my regular days off this year. I shall schedule my vacation for the coming years to include these days so that I will be able to comply with their observance.

I would like to thank you again for your sincere understanding and cooperation in this manner. You have certainly brightened my outlook and future.

22. In March 1969, Plaintiff requested from his supervisor to leave early on a Friday evening so that he could conform with the Sabbath. Fox told Plaintiff that he could not say yes or no, but to use his own judgment. Plaintiff subsequently punched out and went home. He received no reprimand from the Company for so doing.

23. Plaintiff was absent on the following days when he was scheduled to work for TWA: March 8, March 15 and March 22, 1969.

24. A few days prior to March 8, 1969, Plaintiff had two separate conversations concerning his desire to be excused from work on March 8, 1969, (1) with Everett Kussman, Manager, Stores Systems and James Tinder, Local 1650 steward; and (2) with his immediate foreman, Nicholson, alone.

The first meeting was on March 6, 1969, and was initiated by Kussman on March 6, 1969, with Plaintiff and his Union steward, Tinder to discuss Plaintiff's religious needs after Kussman saw that Plaintiff was scheduled to work on Saturday, March 8, 1969 due to vacation schedules. Following the March 6, 1969 meeting, Plaintiff was still scheduled to work on March 8, 1969.

25. On March 8 Plaintiff was absent from work. He called in to the Day Storekeeper and told him he would like to have the day off for personal business and that he would not be in. The Day Storekeeper asked if the Plaintiff had talked to his immediate supervisor. Plaintiff said that he had, but that his immediate supervisor would not allow the day off. The Day Storekeeper then said that he could not allow the day off either. Plaintiff did

not inform the Day Storekeeper that he was being off to observe what he considered to be the Sabbath.

26. A few days prior to March 15, Plaintiff had a conversation with his substitute foreman, Stewart (a substitute for Nicholson), and asked to be excused for March 15, 1969. Stewart refused to excuse Plaintiff for March 15, 1969. No one but Stewart and Plaintiff were present during this conversation.

27. On March 15, Plaintiff was absent from work. Plaintiff tried one time to report his absence by telephone and claims that he could not reach anyone at the Company.

28. On about March 21, Plaintiff had a conversation with W. J. Butcher, Supervisor Stores Planning and Control, in the presence of James Tinder, Local 1650 Steward.

29. As a result of the March 21, 1969 meeting, Butcher wrote Plaintiff the following letter, confirming the contents of the meeting and setting forth TWA's position:

> This letter will confirm our conversation in my office on this date, in the presence of Steward Jim Tinder, regarding your failure to report for work on two consecutive Saturdays—March 8 and March 15, 1969.
>
> During this discussion, you informed me your religious tenets precluded your working at any time between sunset Friday and sunset Saturday. Additionally, you advised you had discussed this with your Minister and there is no provision that would allow you to deviate from this requirement.
>
> The following facts are also a matter of record. Prior to your change of days off from Saturday and Sunday to Wednesday and Thursday, Mr. E. H. Kussman discussed the impending weekend work with you (since he had already made some commitments on allowing

> you to take special religious holiday periods throughout the coming year), and you did not refuse to work Saturday at that time.
>
> Subsequently, on March 6, 1969 you asked your Supervisor, John Nicholson, to be off on March 8, the first Saturday scheduled to work for "personal business" reasons which you refused to clarify. Permission was refused. On the Saturday in question, March 8, 1969, you telephoned Storekeeper Bob Jones and again requested the day off for "personal business" which you again refused to clarify and again were refused. At this time, Mr. Jones asked why you hadn't obtained prior approval from your supervisor and your comments were, "you just didn't get around to it." In your discussion to me you stated your supervisor was a difficult man to talk to. In any case, you did not report.
>
> The following Friday, your Supervisor (R. C. Stewart acting for J. W. Nicholson) advised he had conversation with you directing you to report and explaining the possibility of disciplinary action.
>
> Again on Saturday, March 15, 1969, you did not report nor did the Duty Storekeeper receive a telephone call from you advising you would not be in. In our discussion, you advised a call was made but the line was busy. This fact should not have prevented a later call.
>
> As a result of the foregoing and since you are again scheduled to work Saturday, March 22, 1969, I advised you I have no alternative but to schedule a discharge hearing in your behalf should you fail to appear without an acceptable justification."

30. On March 25, 1969, Butcher wrote Plaintiff the following:

> A discharge hearing in your behalf has been scheduled for Friday, March 28, 1969 at 2:00 P.M. in the Building #2 Conference Room. Your Hearing Officer will be Mr. C. E. Bowman.
>
> You are charged with insubordination in that on Saturday, March 22, you refused to work as directed specifically by my letter of March 21, 1969 which was confirmation of a discussion held with you in the presence of your steward on that date.
>
> The reason for your refusal to work on three successive Saturdays (March 8, 15 and 22) is a matter of record.

31. On March 31, 1969, a discharge hearing was held before J. H. Frey, a designated representative of TWA, pursuant to Article XI(b)(8) of the IAM-TWA collective bargaining agreement. At the hearing, members of Local 1650 grievance committee were present and argued against Plaintiff's discharge on the grounds that TWA had committed certain procedural errors which made any discipline improper and, in any event, that the penalty of discharge was too severe to be invoked against the Plaintiff. Frey's decision was reached by Frey alone. As a result of the hearing, on April 2, 1969, Frey wrote the following to Plaintiff:

> At the discharge hearing held in your behalf on Monday, March 31, 1969, it was established that the facts in the case were not in dispute. You agreed that you refused to work as directed by your supervisor on Saturday, March 22, 1969 and the charge that you also refused to work on March 8 and March 15, 1969 was not contested.

> Further testimony revealed that you conscientiously object and refuse to work between the hour of sundown on Friday evenings to the hour of sundown on Saturday evenings and on certain religious holidays. I would not presume to censure you for abiding by the tenets of your religion, but I would point out to you that TWA as a transportation company, serving the needs of the public seven days a week, has need of employees who will work as required to fill this need.
>
> I, therefore, have no alternative but to find you guilty of insubordination as charged.
>
> Your service with TWA will be terminated effective at the end of your shift on Wednesday, April 2, 1969.

32. Pursuant to the IAM-TWA collective bargaining agreement, if a discharge is made as a result of a hearing conducted by a TWA officer, the discharge is then referred to District 142 for its review and if the District, after reviewing the facts, concludes that the discharge is improper it may refer the grievance to the System Board of Adjustment where the grievance is subject to a final and binding determination by the three man System Board of Adjustment, which includes an impartial neutral and qualified arbitrator pursuant to Article XII of the collective bargaining agreement.

On April 7, 1969, the Local 1650 Grievance Committee Chairman, Earl Box, transferred the case to District 142 Assistant General Chairman Joe Bowman, with the following letter addressed to him

Dear Joe:

This is a sad case in which we found an individual torn between loyalty to his job and loyalty to his religious beliefs. This individual indicated that he was willing to work any hours, take any combination of Days Off, and work any shift as long as he did not have to work between Sundown Friday and Sundown Saturday. Of course, we know what would happen to our TWA-IAM Agreement if we made an exception to our "40 hours a week" clause in this case.

We patiently explained the situation to Mr. Hardison and he indicated that under no circumstances could he violate his religious beliefs even to save his job. He insisted on a hearing and all we could do was plead that discharge was too severe. Mr. Hardison refused to work on three consecutive Saturdays and also punched out and went home on Friday, March 28 at 6:32 p.m.—sundown—even though his absence was not excused. Needless to say, Mr. Hardison was discharged effective Wednesday, April 2, 1969.

We will be happy to answer any questions you might have.

33. On May 1, 1969, Joseph W. Bowman, Assistant General Chairman of District 142, wrote to the Local 1650 Committee as follows:

> This will acknowledge receipt of the above discharge.
>
> After review of this case it is my opinion the Union cannot help this Brother. I tried several times to talk to this Brother about his problem, however, he chose not to talk to me so I must assume he has no interest in working at TWA.
>
> This case is now closed in our files.

34. Plaintiff alleges his unlawful employment practice occurred on or before April 2, 1969.

35. Plaintiff's charge was signed August 25, 1969, and was received by the EEOC before August 29, 1969. The charge named "Trans World Airlines" and "International Association of Machinist and Aero-Space Workers, Vivion Road and Cliffview Drive, Riverside, Missouri."

36. On August 29, 1969, Charles E. Clark, Area Director of the EEOC, wrote a letter to Plaintiff as follows:

> We have received your communication alleging unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964. Under Section 706 (b) of Title VII this Commission is unable to accept jurisdiction in your case until the matter has been deferred for sixty (60) days to the Missouri Commission on Human Rights, 314 East High, P.O. Box 1129, Jefferson City, Missouri 65101.
>
> We are sending a copy of your correspondence to that state agency. Please contact them immediately to be certain that all its requirements for commencing proceedings in your case have been met.
>
> Unless the Commission hears from you to the contrary, we will automatically assert jurisdiction over your charge on the sixty-first (61st) day after receipt by the state agency of your charge. If the state should earlier terminate its proceedings, we will at that time assert jurisdiction.
>
> If you have any further questions, please do not hesitate to call upon us.

37. On August 29, Charles E. Clark wrote the following letter to Sandra Neese, Director of Investigation, Mis-

souri Commission on Human Rights which was received September 2, 1969:

> The enclosed communication has been submitted to us alleging a violation of Title VII of the Civil Rights Act of 1964. Pursuant to Section 706(b) of the Act no charge may be filed with this Commission under Section 706(a) until the expiration of sixty (60) days after proceedings have been commenced under the fair employment practice law of your State, unless such proceedings are terminated earlier.
>
> We would appreciate being informed of the status of this matter at the expiration of 60 days, or at the time you terminate the proceedings, whichever occurs earlier.
>
> On the 61st day of receipt of this communication, or upon earlier termination by you, the Commission will automatically assume jurisdiction unless the charging party notifies us to the contrary. If both the 61st day and termination of your proceedings would fall beyond the statutory limit of 210 days, we will assume jurisdiction on the 209th day following the occurrence of the alleged violation unless the charging party notifies us to the contrary.
>
> Thank you for your kind cooperation in this matter.

38. On October 31, 1969, Charles E. Clark wrote Plaintiff as follows:

> This is in further reference to our letter of August 29, 1969. We advised you that we had to defer to the State agency for sixty (60) days, and that we would assume jurisdiction on the sixty-first (61) day after receipt by the State agency if you had not advised us to the contrary.

> Since we have not heard from you to the contrary we assume you wish this Commission to proceed with our investigation.
>
> May we ask you to indicate the correct spelling of your name, current address, and to furnish a telephone number where you can be reached. This information will assist us in proceeding with your case. A copy of this letter is attached, with blanks for this information. We are also enclosing a self-addressed, postage paid envelope for your convenience.

Thank you for your very kind cooperation in this matter.

39. On November 4, 1969, Plaintiff wrote the EEOC as follows:

> Upon receipt of your letter dated October 31, 1969 I telephoned your office and spoke with Mr. Villarreal. I requested your office defer assumption of the case until after November 18 due to a meeting scheduled between the state investigator, Mr. Lee Henson, and the company involved.
>
> I wish to ask for your deferment of the assumption until after Mr. Henson talks with the company on the above date, or until you are notified otherwise.
>
> Thank you for your concern and continuing cooperation in this matter.

40. On November 18, 1969, Plaintiff wrote the EEOC a letter received on November 19, 1969, as follows:

> This is to give you formal notice that you may now proceed to assume the above referenced case from the Missouri Commission on Human Rights.

I wish to thank you for your lasting interest and consideration you have so well expressed. I remain . . .".

41. On February 27, 1970, the Missouri Commission on Human Rights wrote Plaintiff as follows:

> The Missouri Commission on Human Rights has acted to dismiss your complaint against the above captioned company and union for lack of jurisdiction. In your case this means that your complaints were not filed within 90 days of the alleged act of discrimination.
>
> As a matter of standard practice I wish to advise you that you may request reconsideration of the Commission's decision within thirty days after this notification by addressing a letter to Mr. Richard J. Chamier, Chairman, Missouri Commission on Human Rights, P.O. Box 1129, Jefferson City, Missouri 65101. This letter should state the reasons for your request for reconsideration, if you decide to request such, as well as any additional information or evidence which you believe is relevant.
>
> If we can be of any assistance to you in the future, please do not hesitate to contact us.

41(a). The EEOC's record entitled "Kansas City Area Office Charge Information Sheet" recites in two separate places "filing date—11/3/69."

42. Plaintiff never filed a grievance concerning his discharge or concerning the Company's refusal to allow him to be absent on Saturdays, or concerning any other matter relating to his employment at TWA.

43. When Plaintiff was discharged at TWA on April 2, 1969, he was making $3.37 per hour.

Plaintiff has worked at Kenworth Motor Truck Company since October 1969. Between October 1969 and February 1970, Plaintiff made $475.00 per month. From February 1970 to February 1971, Plaintiff made $520.00 per month. From February 1971 to February 1972, Plaintiff made $590.00 per month. After February 1972, Plaintiff made $660.00 per month.

From July 1969 until October 1969, Plaintiff worked at Beal, Inc., 4001 Kaw Drive, Kansas City, Kansas, as an inventory control clerk at $100.00 per week. From May 1969 until July 1969, Plaintiff worked at Black, Sivalls and Bryson for $390.00 per month gross.

Since his discharge from TWA, Plaintiff has also worked part-time as a store clerk for 7-11 Stores for about a three-month period at $1.60 per hour. Plaintiff's earnings were as follows for the years indicated:

1) 1968—
2) 1969—$5,259.00
3) 1970—$6,855.00
4) 1971—$7,183.00

44. No Defendant made any statements insulting or expressing animus against Plaintiff's religious beliefs.

45. The TWA-IAM collective bargaining agreement was negotiated by the Defendants before the Plaintiff began employment at TWA and with no discussion of religion and without any intent to discriminate against any religion.

46. The TWA-IAM collective bargaining agreement was completely silent concerning matters related to Plaintiff's religion in particular or any religion in general.

47. At no time during any of the Plaintiff's contacts with the Union, including at the discharge hearing on March 31, did the Union tell or indicate to the Company that it should discharge the Plaintiff. And at no time did the Union agree with the Company that the Plaintiff should be discharged.

48. The Union had no objection to the Company allowing the Plaintiff an excuse for his religious holidays which were granted by Kussman in September 1968.

49. The International was never notified of the Plaintiff's alleged religious beliefs or of the discharge for religious beliefs.

50. The Plaintiff never attempted to exercise his rights internally within the Union structure to have his grievance processed or to have any alleged wrongs corrected.

IV. *The Reservations to the Facts Recited in Paragraph III Above are as Follows*: Each Defendant denies responsibility for the acts of any individuals except their agents. Accordingly, each Defendant reserves the right to object to the acts of any individual, other than its agent, as irrelevant, immaterial and not probative of any wrongdoing by that Defendant.

V. *The Following Facts, Though not Admitted, are not to be Contested at the Final by Evidence to the Contrary*: None.

VI. *The Following Issues of Fact, and No Others, Remain to be litigated Upon the Trial*: Whether the following facts are true:

1. When did Plaintiff begin to follow his religion. When did he first mention it to the Company. Did Plaintiff work some Saturdays and also some religious holidays after beginning to follow his religion.

2. Did Plaintiff transfer to a new seniority grouping that provided him less relative seniority at a time when he knew, or should have known, that he would have less ability to utilize his seniority to bump into an acceptable day off. Could Plaintiff have avoided his problems and have protected his right to be off on his Sabbath by not transferring into the lower job seniority grouping.

3. Whether the Local District and International Union at no time whatsoever complained to the Company of the Plaintiff's conduct or take any other action designed to penalize the Plaintiff or to charge him with insubordination or any other offense.

4. What were the positions of the Plaintiff and Defendants at the various meetings that each attended.

5. If Plaintiff was allowed to select a job or bid a job or bump a job out of seniority, would it mean that another individual with more seniority who also bid on the same job but who did not share Plaintiff's religious beliefs would be deprived of the job as was the more senior employee's entitlement under the collective bargaining agreement.

6. In replacing Wyatt, did Plaintiff become the only employee available on weekends to perform the required duties performed by Wyatt.

7. Whether Plaintiff's absence from his job on Saturdays would have a disruptive effect on the work schedule on Building No. 2 of the overhaul base.

8. Whether Plaintiff's absence from his job on Saturday would lead to personnel problems or grievances from other employees.

9. Whether permitting all employees upon their request to be absent for religious observances would have a disruptive effect on TWA's business.

10. Whether due to the size of TWA's work force and the nature of its operation, to allow Hardison to be absent after giving alleged false excuse and without prior Company approval would create chaotic personnel problems and create an undue hardship upon TWA and the Unions in administering a workable system regulating the employment relationship.

11. Whether decisions of the System Board of Adjustment appointed pursuant to the grievance procedure under the requirements set forth in the Railway Labor Act are binding and final upon TWA and the Unions and establish that employees must obey management directives and grieve disputes with management rather than resort to self-help or they are guilty of insubordination which, if allowed to exist, would cause industrial chaos.

12. What happened when Plaintiff had a conversation with his immediate supervisor, Nicholson, approximately on March 6 and requested to be excused on March 8.

13. When the charging party was absent on March 8 and 15 what he told the Company about the reason for his absence.

14. Whether both before and after the March 31, 1969, Company-conducted discharge hearing, the Plaintiff was informed by the Local Union Committee and others that an unfavorable decision in the hearing would be sent to the District for its consideration and that he should contact Joseph Bowman at the District to discuss the matter so that Bowman would have sufficient knowledge to base a decision on whether the matter should be appealed to the System Board of Adjustment.

15. Whether after Plaintiff's discharge, his discharge case was referred to District 142 and thereafter, the agent responsible for processing the grievance for District 142, Joe Bowman, attempted to set up a meeting with Hardison promised to meet with Bowman, but failed to keep his appointment and never contacted or cooperated in the processing of the grievance at the District level and thereby caused the matter to be dropped by the District.

16. Whether Plaintiff took steps necessary to process a grievance under the TWA-IAM agreement.

17. Whether Plaintiff took steps to bring his religious days off to the Local 1650 Relief Committee.

18. Whether the Defendant Unions took steps to assist Plaintiff in processing his grievance under the TWA-IAM agreement.

19. Whether throughout his employment at TWA, Plaintiff was aware that he could file a grievance to resolve a grievance or dispute against the Company.

20. Whether the District had any knowledge of the Plaintiff's religious beliefs until the case was transferred to the District level following the discharge hearing of March 31.

21. Whether defendant Unions took steps to assist Plaintiff in bringing his request for religious days off before the Local 1650 Relief Committee.

22. What was the manner of filling vacancies when a vacancy occurs on a weekend shift in the Stores Department at MCI.

23. Whether Defendant TWA attempted a reasonable accommodation for the observance of Plaintiff's religious beliefs.

24. Did TWA take any action to reasonably accommodate Plaintiff observing his Sabbath.

25. Whether accommodation of Plaintiff's Sabbath observance was possible for TWA without due hardship.

26. Was Twa willing to accommodate Plaintiff's Sabbath observance but prevented from doing so by Defendant Unions or any of them.

27. Whether Defendant Unions, or any of them, failed to properly represent Plaintiff in his discharge grievance against TWA.

28. Whether Plaintiff suffered any loss of income or benefits due to his discharge by TWA.

VII. *The Exhibits to be Offered at the Trial, Together with a Statement of All Admission by and All Issues between the Parties with Respect Thereto, are as Follows:*

a) Exhibits which may be offered by Defendant Unions 1650 and 142:

Union Ex. 1. Booklet entitled "Agreement between TransWorld Airlines, Inc., and International Association of Machinists and Aerospace Workers, Mechanics and Related Employees" signed August 25, 1966, consisting of one-hundred twenty pages.

Union Ex. 2. Booklet entitled "International Association of Machinists and Aerospace Workers Constitution, January 1, 1969" consisting of one hundred forty-two numbered pages.

Union Ex. 3. Booklet entitled "By-Laws International Association of Machinists & Aerospace Workers, District Lodge No. 142, Amended in Convention, 1967, Approved by International President, October 2, 1967" consisting of sixteen numbered pages.

Union Ex. 4. Booklet entitled "By-Laws of Air Capital Lodge 1650 International Association of Machinists and Aerospace Workers, Affiliated with the AFL-CIO, approved Effected by G. L. as of July 1, 1968" consisting of thirty-one numbered pages.

Union Ex. 5. Four page document entitled "Trans-World Airlines, Inc. Application for Employment" apparently completed by Larry Glen Hardison and dated February 27, 1967.

Union Ex. 6. One page document on stationery headed "TWA Interoffice Correspondence" apparently addressed to L. G. Hardison from E. H. Kussman, Manager, Systems Stores and dated October 11, 1968.

Union Ex. 7. One page document on stationery headed "TWA Interoffice Correspondence" apparently addressed to L. G. Hardison from W. J. Butcher, Supervisor Stores Planning & Control and dated March 21, 1969.

Union Ex. 8. One page document on stationery headed "TWA Interoffice Correspondence" apparently addressed to L. G. Hardison from W. J. Butcher and dated March 25, 1969.

Union Ex. 9. Two page handwritten document apparently notes of the Union committee at the discharge hearing, headed "Discharge—L. G. Hardison Co. Sen. 6-5-67".

Union Ex. 10. One page document on stationery headed "TWA Interoffice Correspondence" apparently addressed to L. G. Hardison from J. H. Frey, Hearing Officer, and dated April 2, 1969.

Union Ex. 11. One page letter on stationery headed "TransWorld Airlines, Inc." apparently addressed to Larry Hardison from Burns Prather, Manager, Industrial Relations, and dated April 14, 1969.

Union Ex. 12. One page document apparently addressed to Joe Bowman Assistant General Chairman, District 142 from Earl Box, Chairman, CKI Grievance Committee and dated April 7, 1969.

Union Ex. 13. One page document apparently addressed to Earl Box from Joseph W. Bowman and dated May 1, 1969.

Union Ex. 14. Two page letter on stationery headed "TWA TransWorld Airlines, Inc." apparently addressed to Charles E. Clark from James J. Mollenkamp, dated April 28, 1971.

Union Ex. 15. Three page letter apparently addressed to Charles E. Clark from Michael D. Gordon dated May 4, 1971.

Union Ex. 16. One page letter apparently addressed to Charles Clark from Thomas J. Cox, Jr. and dated May 13, 1971.

Union Ex. 16a. One page attachment originally enclosed with Union Exhibit 16 headed "Answer-TWA" written by L. G. Hardison.

Union Ex. 16b. Three page attachment originally enclosed with Union Exhibit 16 headed "Answer-Jolley, Walsh & Gordon" written by L. G. Hardison.

Union Ex. 17. One page document apparently a memo from Sandra Neese to Glenn Means dated May 3, 1971.

Union Ex. 18. Decision of the System Board of Adjustment (Ralph Steward, neutral) in Grievance No. 12346 arising in Kansas City, Kansas, dated November 3, 1968, consisting of three pages.

Union Ex. 19. Award and Opinion of System Board of Adjustment (Lennart V. Larson, neutral) transmitted to parties on May 20, 1965, involving Disciplinary Layoffs for Insubordination and consisting of eight pages.

Union Ex. 20. Report of Arbitration Proceedings, Opinion and Award (Marion Beatty, neutral) rendered September 10, 1965, involving L. R. Morris insubordination discharge and consisting of four pages and a one page appendix.

Union Ex. 21. Decision of System Board of Adjustment (Roy Ray, neutral) dated May 23, 1961, arising at LaGuardia Airport, New York, involving J. P. Murray insubordination suspension and consisting of nine pages.

b) Exhibits which may be offered by Defendant TWA:

D. TWA Ex. 1. Charge of Discrimination of Larry Glenn Hardison dated August 25, 1969 and attachments thereto. (eight pages)

D. TWA Ex. 2. Letter dated August 29, 1969 from Charles E. Clark to Sandra Neese. (one page)

D. TWA Ex. 3. Letter dated August 29, 1969 from Charles E. Clark to Larry Glenn Hardison. (one page)

D. TWA Ex. 4. Letter dated October 31, 1969 from Charles E. Clark to Larry Glenn Hardison. (one page)

D. TWA Ex. 5. Letter dated November 4, 1969 from Larry G. Hardison to the Equal Employment Opportunity Commission. (one page)

D. TWA Ex. 6. Letter dated November 18, 1969 from Larry G. Hardison to the Equal Employment Opportunity Commission. (one page)

D. TWA Ex. 7. Kansas City Area Office Charge Information Sheet maintained by the Equal Employment Opportunity Commission. (one page)

D. TWA Ex. 8. Receipt for Certified Mail dated August 29, 1969. (two pages)

D. TWA Ex. 9. Company Employment Record of Larry Glenn Hardison. (two pages)

D. TWA Ex. 10. Application for Employment of Larry G. Hardison dated February 27, 1967. (two pages, including the front and reverse sides thereof)

D. TWA Ex. 11. Letter dated October 11, 1968 from E. H. Kussman to L. G. Hardison. (one page)

D. TWA Ex. 12. Letter dated March 21, 1969 from W. J. Butcher to L. G. Hardison. (one page)

D. TWA Ex. 13. Letter dated March 25, 1969 from W. J. Butcher to L. G. Hardison. (one page)

D. TWA Ex. 14. Letter dated April 2, 1969 from J. H. Frey to L. G. Hardison. (one page)

D. TWA Ex. 15. Letter dated March 13, 1971 from Thomas J. Cox to Charles E. Clark, and attachments. (five pages)

D. TWA Ex. 16. Letter from Larry G. Hardison to the Equal Employment Opportunity Commission. (one page)

D. TWA Ex. 17. TWA Attendance Records for Larry G. Hardison. (several pages)

D. TWA Ex. 18. TWA Stores Work Schedule. (several pages)

D. TWA Ex. 19. Notices of Vacancies at MCI. (several pages)

D. TWA Ex. 20. Agreement between Trans World Airlines, Inc. and the International Association of Machinists and AeroSpace Workers signed August 25, 1966. (one hundred twenty-eight pages)

D. TWA Ex. 21. W-2 Statements for Larry G. Hardison for the years 1967 to 1972 inclusive. (six pages)

D. TWA Ex. 22. Church Attendance Records of Larry G. Hardison. (number of pages unknown)

c) Exhibits which may be offered by Plaintiff:

Plaintiff Ex. 1. Equal Employment Opportunity Commission Regulation regarding employment duties of employer involving religious discrimination to all Equal Employment Opportunity Commission records.

Plaintiff Ex. 2. All personnel records and employment discipline records in the custody of the Defendants which are the subject to a Rule 34 Motion before the Court at this time.

Defendant Unions reserve the following objections:

(1) With respect to documents listed by Plaintiff, Defendant Unions state that Plaintiff's description is so vague and ambiguous that it has insufficient knowledge of the exact documents that may be offered by Plaintiff at the trial and therefore reserves all objections that can be appropriately made thereto.

(2) With respect to the following documents listed by Defendant TWA, Defendant Unions have no objection to the genuineness of such documents, but object to the subject material contained in such documents to prove the truth of any matter asserted therein as hearsay; Defendant Unions also object to the following documents as incompetent, conclusionary, immaterial and irrelevant to prove any wrongdoing on the part of Defendant Unions: D. TWA Ex. 1, 15 and 16.

VIII. *The Following Issues of Law, and No Others, Remain to be Litigated Upon the Trial:*

1. Whether the International was properly served with process.

2. Whether the purported service on the International is defective because James Tarwater is not "an officer or managing or general agent" or an "agent authorized by appointment or by law to receive service of process" within the meaning of FRCP4(d)(3).

3. Whether the Plaintiff properly filed his charge before the EEOC against Defendant TWA and each of the Defendant Unions within 210 days of the alleged unlawful employment practice.

4. Whether the District is responsible for any illegal acts of Local 1650.

5. Whether Local 1650 is responsible for any illegal acts of District 142.

6. Whether the International is responsible for any illegal acts of Local 1650 or District 142.

7. Whether any Union Defendants are responsible for any wrongful acts of Defendant, TWA, or vice versa.

8. Whether, absent intentional discrimination, unions are legally responsible for Title VII rights arising under Title VII or whether their duty is limited to fair representation of employees pursuant to the collective bargaining contract.

9. Whether there is any direct evidence of discriminatory intent on behalf of any Defendants.

10. Whether the IAM-TWA collective bargaining agreement is non-discriminatory on its face.

11. Whether any Defendant purposely attempted to discriminate against Plaintiff because of his religion.

12. Whether the Railway Labor Act requires that an employee discharged for "insubordination" which he alleges is protected by a religious privilege, must exhaust the grievance procedure set out in a collective bargaining contract established pursuant to the Railway Labor Act before instituting suit under Title VII of the Civil Rights Act of 1964 where his allegations of discrimination are on an individual, rather than a class basis.

13. Whether Title VII required reasonable accommodations at the time the Plaintiff's discharge occurred.

14. Whether each Defendant Union was under a duty to make reasonable accommodations for Plaintiff's religious beliefs.

14a. Whether TWA is relieved of liability if the Union did not properly represent Plaintiff.

15. Whether TWA is not in violation of 42 U.S.C. Section 2000e et seq. because it made reasonable accommodations to Plaintiff's religious needs.

16. Whether TWA is not in violation of 42 U.S.C. Section 2000e et seq. because the IAM Defendants pre-

vented TWA from accommodating Plaintiff's religious needs by refusing to permit Plaintiff to trade shifts or change sections.

17. Whether TWA is not in violation of 42 U.S.C. Section 2000e et seq. because it would have suffered undue hardship on the conduct of its business by making accommodations to Plaintiff.

18. Whether allowing Plaintiff to take off work Saturdays without pay, which was acceptable to the Union, or make other adjustments not inconsistent with the collective bargaining agreement, provided a "reasonable accommodation" that fulfilled the Unions' legal responsibilities.

19. Whether allowing Plaintiff to select shifts or jobs contrary to the express provisions of the collective bargaining contract would create undue hardships upon the Unions.

20. Whether to allow Hardison to select his shift or jobs contrary to the express provisions of the collective bargaining contract would violate the constitutional and religious rights of other Union represented employees who did not share the Plaintiff's religious beliefs but who celebrated another Sabbath, or who exercised their right not to celebrate any Sabbath at all.

21. Whether Plaintiff is precluded from asserting the claims herein since the lack of seniority which he had in March 1969 was caused by his own acts of bidding into a new seniority grouping where he knew or should have known, that his ability to select shifts would be greatly diminished.

22. Whether Plaintiff should have filed a grievance immediately when the Company first indicated it would not excuse his Sabbath absences and whether his failure

to do so, and his subsequent resort to self-help and purposeful disobedience to Company orders and work schedules precludes him from bringing this action.

23. Whether Plaintiff is precluded from enforcing his Title VII rights against the Unions by not cooperating with the processing of his grievance concerning his discharge and otherwise exhausting his rights under the collective bargaining contract.

24. Whether Plaintiff is barred from asserting the claims made herein since he did not exhaust his internal Union remedies or his rights to process his grievance under the Railway Labor Act.

25. Whether 42 U.S.C. Section 2000e et seq. is unconstitutional to the extent it purports to require an employer such as TWA to accommodate the religious needs of an employee such as Plaintiff in violation of the First Amendment to the Constitution of the United States which provides, in part, that "Congress shall make no law respecting an establishment of religion. . . ."

26. Whether if Plaintiff prevails in this action, Defendants' liability for backpay is limited to two years by reason of the 1972 amendment to 42 U.S.C. Section 2000e-5(g).

27. Assuming Plaintiff's Title VII rights have been violated, whether Defendant Unions are liable for any monetary damages and if so, which Union Defendants, and in what amount.

28. Whether or not Plaintiff was discharged by Defendant TransWorld Airlines because of his religion and in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e.

29. Whether or not the Local 1650 and District 142 and the International Association of Machinists and Aero-Space Workers violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e by any action taken towards Plaintiff.

30. The legal damages and reasonable attorney's fees to which Plaintiff is entitled if any Defendant or all Defendants are in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e.

IX. The foregoing admissions having been made by the parties, and fee parties having specified the foregoing issues of fact, and law remaining to be litigated, this order shall supplement the pleadings and govern the course of the final in this cause, unless modified to prevent manifest injustice.

....., 1972.

STIPULATION

(Filed October 26, 1972)

Come now the parties by their attorneys and stipulate to the following additional facts which are admitted and require no proof:

Trans World Airlines, Inc. (TWA or the Company) was incorporated as Transcontinental & Western Air, Inc. under the laws of the State of Delaware on December 27, 1934 by the consolidation of two Delaware corporations engaged in air transportation, one of which had instituted the first coast-to-coast air passenger service in 1930. The corporate name was changed to Trans World Airlines, Inc. on May 17, 1950.

TWA has been engaged in the transportation of persons, property and mail by air since its organization. During that time TWA has operated a transcontinental system in the United States. Since 1946 it has operated a transatlantic system which extends from the United States to points in Europe, Africa and Asia and since August 1969 a transpacific system between the United States and Asia which connects with its transatlantic system, thus providing an around the world service. TWA's wholly-owned subsidiary, Hilton International Co. (Hilton), operates 51 hotels in 35 foreign countries, Hawaii, Puerto Rico and St. Thomas in the United States Virgin Islands.

TWA's passenger business is the chief source of its revenues. Within the United States, TWA competes on almost all of its routes with at least one of the other ten domestic trunk airlines and on many of its major routes competes with two or more of such airlines.

TWA's international system encompasses travel between the United States and Europe, Africa and Asia. Of this route structure the United States/Europe traffic is of primary significance. TWA competes with 20 other International Air Transport Association (IATA) airlines, including one other United States flag carrier, and two non-IATA airlines, which operate scheduled passenger service between the United States and Europe. TWA carries cargo (mail, express and freight) on its domestic system and mail and freight on its international system and also operates military and commercial charter flights, the military being the more important of the two.

Under the Federal Aviation Act of 1958, as amended, TWA along with other air carriers, is subject to regulation by the CAB, the Administrator of the FAA and the Post Office Department. TWA operates over routes authorized by Certificates issued by the CAB. In addition, the opera-

tions of TWA's international system require the permission of the respective countries served and compliance with their laws and regulations.

Certificates issued by the CAB may be amended or suspended by the CAB, after a hearing, if in its opinion the public convenience and necessity so require, or they may be revoked for intentional failure, after notice, to comply with their terms or with the Federal Aviation Act or orders, rules or regulations under the Act. No Certificate may be transferred and no route may be abandoned without approval of the CAB. The issuance, renewal, amendment or revocation of international route Certificates by the CAB requires the approval of the President of the United States. Every air carrier must obtain a Certificate, or an exemption from the Certificate requirements of the Federal Aviation Act, in order to engage in interstate or foreign air transportation or the transportation of mail by aircraft.

In addition to its control over routes, the CAB regulates rates for transportation of United States mail and, in domestic transportation, passenger fares and rates for the transportation of property. Fares and rates for intrastate operations in certain states are subject to regulation by state authorities.

The Administrator of the FAA, whose functions are exercised within the Department of Transportation, is concerned, generally, with the regulation of flying operations, including aircraft, personnel, ground facilities and certain technical matters.

The Post Office Department has jurisdiction over certain aspects of the transportation of mail. Rates for airmail dispatched from foreign countries are fixed by the governments concerned pursuant to the Universal Postal Union Convention.

TWA had approximately 42,500 employees in 1969 (including approximately 2,500 working at the John F. Kennedy Space Center, but excluding approximately 21,000 employees of Hilton and its subsidiaries), of whom about 8% were based outside the United States. Approximately 53% of TWA's employees were covered by contracts with unions in 1969, including approximately 15,000 employees covered under TWA's collective bargaining agreement with the International Association of Machinists and Aero Space Workers. At the present time TWA employs approximately 37,000 employees at approximately 100 locations.

Labor relations of air carriers are subject to Title II of the Railway Labor Act, as amended, which contains provisions giving employees the right to organize and bargain collectively through representatives of their own choosing and imposes upon air carriers and their employees the duty to use every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle by negotiation all disputes arising between them.

TWA's principal executive offices are located at 605 Third Avenue, New York, New York 10016. TWA's principal maintenance and overhaul base is located at Kansas City International Airport, Kansas City, Missouri 64153. The maintenance and overhaul facilities include Building No. 1, which is used for the overhaul of air frames and Building No. 2, which is used for the overhaul of aircraft engines. All of TWA's air frame overhaul work, as well as the overhaul and major maintenance of aircraft engines and aircraft components, is accomplished at the Kansas City International Airport maintenance and overhaul base.

The foregoing stipulation having been made by the parties, this stipulation shall supplement the pleadings and STANDARD PRE-TRIAL ORDER NO. 2.

STIPULATION

(Filed November 8, 1972)

COME NOW the parties and hereby stipulate and agree as follows:

1. That plaintiff, Larry G. Hardison, received the following wages for the respective years from each employer as stated below:

A. May, 1969 - July, 1969, Black, Sivalls & Bryson;

July, 1969 - October, 1969, Beal, Inc., 4001 Kaw Drive, Kansas City, Kansas;

October, 1969 - December, 1969, Kenworth Motor Truck Company;

Total wages through December, 1969 - $3,006.00.

B. 1970, 1971, Kenworth Motor Truck Company,

1970 - $6,855.00

1971 - $7,183.00

C. January 1, 1972, through October 17, 1972 (date of trial) - $6,645.00.

D. TOTAL OF A THROUGH C - $23,689.00.

2. That Plaintiff, Larry G. Hardison, would have earned the following wages at defendant, Trans World Airlines, Inc., assuming Mr. Hardison would have worked eighty (80) hours in each pay period (two weeks) from April 1, 1969, through October 17, 1972 (time of trial):

	Gross	Federal	FICA	State	City	NET
1969	$ 6,157.60	$1,087.60	$ 295.56	$ 74.85	$ 30.79	$ 4,668.80
1970	9,154.40	1,570.50	374.40	115.28	45.77	7,048.45
1971	9,900.16	1,576.80	405.60	146.30	99.00	7,672.46
1972	8,270.00	1,376.10	430.04	124.32	82.71	6,256.83
TOTAL	$33,482.16	$5,611.00	$1,505.60	$460.75	$258.27	$25,646.54

IT IS FURTHER STIPULATED AND AGREED that the preceding calculations took into consideration the following Contract Rate increases:

Rate		
4/7/69	$3.97	(New Contract Rate)
6/16/69	$4.08	(New Contract Rate)
2/1/70	$4.35	
8/1/70	$4.52	
1/1/71	$4.59	
5/1/71	$4.84	
6/14/71	$4.85	
1/1/72	$4.92	
6/12/72	$4.93	

3. That the monetary amount of the fringes and benefits available to plaintiff, Larry G. Hardison, if he would not have been terminated from the employ of Trans World Airlines, Inc. is contested by the parties and is submitted for determination by the Court. Plaintiff claims that fringe benefits have a value of 12.3% of plaintiff's base pay. This percentage was arrived at from TWA's proposed filing with the Pay Board, and the figure includes Group Insurance, Trust Annuity, Retirement Plan and Stock Purchase Plan, but does not include airline passes. Plaintiff claims that the gross monetary value of the fringe benefits that plaintiff would have been entitled to if he had

remained with TWA is 12.3% of $33,482.16, which equals the sum of $4,118.31.

Defendants claim that the value of fringes and benefits is speculative and conjectural and cannot be determined with reasonable certainty so as to constitute a proper element of damages. Further, defendants claim that the value, if any, of benefits which plaintiff would have obtained at TWA should be reduced by the value of benefits which plaintiff testified in his deposition he obtained in his other employment. Finally defendant TWA claims that if plaintiff's employment with TWA is reinstated as a result of this action, certain benefits may be adjusted to make plaintiff eligible therefor as if he had never been terminated in lieu of cash damages to plaintiff.

4. That TWA employees such as plaintiff were entitled to an allotment of four (4) passes on TWA flights during the years 1969 and 1970 and an allotment of five (5) passes on TWA flights in 1971 and 1972 respectively. This allotment is not cumulative from year to year and unused passes are forfeited. Plaintiff claims he is entitled to the monetary value of these flights which is submitted for determination by the Court. Defendants claim that the value, if any, of passes is too speculative and conjectural and cannot be determined with reasonable certainty so as to constitute a proper element of damages.

5. That during his employment plaintiff took one trip with his wife, or used two (2) passes; said trip was to Tampa, Florida.

The foregoing, having been submitted by the parties hereto, by and through their respective counsel, may or may not, in the Court's discretion, be included in a determination of plaintiff's damages, if the Court determines that plaintiff has been subject to a violation of Title VII of the Civil Rights Act of 1964.

STIPULATION

(Filed November 21, 1972)

During the trial of this cause a question was raised concerning the status of the employee in *Riley* v. *Bendix Corp.*, 4 E.P.D. ¶7902 (5th Cir. 1972). Counsel for TWA has contacted Mr. Aubrey L. Raymond, Regional Operations Counsel for Bendix, who furnished a letter dated October 31, 1972 concerning this matter, a true copy of which is attached hereto and made a part hereof. Based upon this letter the parties by their attorneys stipulate and agree that Charles Riley was a non-union employee of Bendix and was not covered by any collective bargaining agreement during his employment with Bendix.

BENDIX

The Bendix Corporation
Executive Offices
Bendix Center
Southfield, Michigan 48075

James Mollenkamp, Esq.
General Attorney
Transworld Airlines, Inc.
Room 1-319
Kansas City International Airport
Kansas City, Missouri 64153

October 31, 1972

Dear Mr. Mollenkamp:

In reply to your inquiry regarding Charles Riley's employment with The Bendix Corporation I have reviewed our litigation files and find that his position as a salaried

employee with the title of supervisor at our Launch Support Division is stated in the recent opinion of the Court of Appeals. A copy of the Court's opinion is enclosed for your information and use. You will find the statement I refer to on page two of the opinion.

In addition it may assist you to know that our supervisory employees are not unionized in this division and that Charles Riley was not covered by any collective bargaining agreement while employed by Bendix.

Please let me know if you require any further information regarding this matter.

Very truly yours,

/s/ Aubrey L. Raymond
Aubrey L. Raymond
Regional Operations Counsel

ALR: dw
Enclosure

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 20096-1

LARRY G. HARDISON,
Plaintiff,

-vs-

TRANS WORLD AIRLINES, INC., et al.,
Defendants.

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that heretofore on Wednesday, the 18th day of October 1972, the above-entitled cause came on before the HONORABLE JOHN W. OLIVER, Judge of Division One of the above court, sitting at Kansas City, Missouri, and the following proceedings were had and entered of record:

The plaintiff was present in person and by his attorney, Mr. William H. Pickett.

Defendant TWA was represented by their attorney, Mr. James J. Mollenkamp.

Defendant Unions were represented by their attorney, Mr. Michael D. Gordon.

* * *

[35] LARRY GLENN HARDISON,

called as a witness in his own behalf, was duly affirmed and testified as follows:

Direct Examination by Mr. Pickett

[36] Q. And you are the plaintiff in this cause? A. Yes.

Q. What particular member, what particular religion, sir, are you a member of? A. The Worldwide Church of God.

Q. Would you share with the Court briefly when you first began to consider accepting the tenets of that religion? A. I began a study in early of '68, in the springtime, I believe.

Q. Did you at that time more or less come into the religion or follow the religion? A. I was speaking to my mother, who was also in the church, and she was guiding me along, and I did not start attending at that time nor following any of the major precepts.

Q. Now, sir, approximately what time in the chronological year of 1968 did you adopt the fundamental precepts and begin following, as you just stated to the Court, the Worldwide Church of God? A. It would have been late September or early October, 1968.

Q. All right, sir, you first began employment with TWA approximately 1967. During the period of time in approximately April 25, 1968, on what particular position were you with TWA and what particular shift were you [37] employed at with TWA? A. What time in 1968. I'm sorry, I didn't catch that.

Q. Yes, on April 25, 1968, where were you working for TWA, what were you doing and what time of day and what shift were you on? A. I was at Mid-Continent Airport. I was a stores clerk in the stock room, and I believe at that time I was on the twilight shift.

Q. The twilight shift being what? A. 3:30 to 11 o'clock p.m.

Q. At approximately September or October of 1968, when you stated to the Court that you began to follow the religion, what shift were you on, what position? A. I had the same position and I had transferred to the graveyard shift, which is 11 p.m. to 7 a.m.

Q. During that particular period of time, what building were you employed at? A. Building 1.

Q. During the period of time that you had transferred to the graveyard shift, did this provide any problem with any of your religious beliefs? A. No, sir.

Q. Why? A. Because I had Saturday and Sunday off, as such, graveyard being the first shift, when we were off Friday, that [38] began our weekend Friday morning, and we didn't have to go back to work until Sunday evening.

Q. When is the Sabbath, so the Court can get the chronological essence of your testimony? A. Sunset Friday to Sunset Saturday.

Q. Are there other religious holidays which the Worldwide Church of God observes? A. Yes.

Q. The first one of these beginning on what day, sir? A. Well, it is not any one set day. It is in the springtime, which is the First Day of Unleavened Bread.

Q. During the year of 1969 do you remember when the Day of Unleavened Bread fell? A. In April of '69?

Q. Yes. A. It was April 3, I believe.

Q. When were you discharged from TWA? A. April 2.

Q. 1969? A. Yes.

Q. That was the first religious holiday in 1969? A. Yes.

Q. Now, when you transferred to the graveyard shift, you did not have any trouble with your religion as far as observing the Sabbath, is that a fair statement? [39] A. Yes.

Q. When did you first encounter any problems with Sabbath leave? Did you remain on the graveyard shift and working in Building No. 1? A. Well, in December of '68 I transferred to the day shift in Building 2.

Q. Why did you do this, sir? A. So that I could be on the day shift. I was married at the time and that is more of a convenient time.

Q. Did you at that particular time while employed on the day shift have any difficulty with observing your Sabbath? A. Only when the man with less seniority than me went on vacation.

Q. Prior to March 6, or 7, or 8, of May 1969, did you have any difficulty observing the Sabbath while being employed in Building 2? A. No.

Q. What transpired on or about March 7 that caused you difficulty in observing the Sabbath? A. Well, March 8 was a Sabbath, and a man of less seniority than I went on vacation at that time, and beings as I was next up, I was required to work in his position, and I did not show up for work that day.

Q. Now, sir, when you say next up, would you care to amplify that for the Court, please? [40] A. Well, I was second from the bottom of the seniority group in the section that I worked, which was the Progress Department.

Q. In Building No. 1? A. Yes.

Q. On the daylight shift? A. Yes.

Q. What was that gentleman who, as I understand, his name is Bill Wyatt's days off? A. Tuesday and Wednesday.

Q. What were your days off prior to that? A. Saturday and Sunday.

Q. Be being in the position of taking his position, did this cause you any difficulty in observing your Sabbath, which I understand is basically Friday Sunset through Saturday Sunset? A. Yes, it did cause problems because I would have been required to work, and of course that is not acceptable, so I did not work that day.

Q. All right, sir. I will hand you what has been marked—

* * *

[41] A. Well, it is a letter written by me to Mr. Everett Kussmann, dated April 25, where I am requesting to meet him to see about changing my days off so that I might have either Friday and Saturday or Friday Sunset to Saturday Sunset off so that I might observe the Sabbath.

* * *

[81] Q. We have covered yesterday as to how you informed them, et cetera, et cetera, and then I believe around December 1968 you transferred into Building 2? A. Yes.

Q. Then did you have any difficulty observing the Sabbath while you were in Building 2? A. Only until—I kept the Sabbath until the man of less seniority than I went on vacation.

Q. All right, this would have meant that you would have worked on March 8 and March 15 to replace him, is that not correct? A. Yes.

Q. Now, did TWA at any time or did any of the Union officials in conjunction with TWA set up any meeting to discuss any way to eliminate this? A. Yes, before the first Sabbath I would have been required to work. Mr. Kussmann called me down to his office. Our Union steward, Mr. Tinder, was present during that [82] discussion.

The Court: Do you remember the date of that discussion?

The Witness: I believe it was March 8.

Q. (By Mr. Pickett) There has been no documentary evidence about that particular meeting, March 6. Would you share with the Court the extent that you can, the

best of your recollection, what transpired at that particular meeting? A. Well, Mr. Kussmann started out the conversation stating that he saw that a shift change was going to require me to work on the Sabbath, and of course I affirmed that there would be, and then we began discussing how to get around my requirement for work, not whether I would work or not but we discussed a possible shift change in that I knew that the man on the graveyard shift did not care for the graveyard shift, and so we talked about that. Then Mr. Tinder—well, let me state this, that it was acceptable with Mr. Kussmann that if it could be worked out, fine.

Q. Would you please be more specific when you say "worked out",-and what do you mean by worked out? A. Well, worked out by my shifting from the shift I was on to the graveyard shift and the man that was on graveyard shift switching to my position.

Q. All right, this would mean that you would remain in the [83] same building or section but a change in the hourly time of day that you would be working? A. Yes, sir, then it was proposed to Mr. Tinder and he said no, it would have to be by seniority, you know, for me to bump in there. Well, the man that was on that shift had higher seniority than I, so I could not bump him, so the next thing that was discussed was my transferring back to Building 1 in that I had planned on doing it after my time had elapsed. By this, I mean I had transferred to Building 2. As best I recall, there was a six-month waiting period before I could make another transfer back to where I was. Therefore, all that time had not elapsed yet and I had yet, oh, two or three months to go, and I proposed this to Mr. Kussmann, saying, you know, that I would like to go back, and if it could be worked out then that would be acceptable to me.

Q. Now, if you had went back, how would this eliminate your working on the Sabbath? A. I had enough seniority to hold weekends off, on the graveyard shift, at least.

Q. Which was the shift you had originally had before you bumped in to Building 2? A. Yes.

Q. And what particular type of acceptance did the Union have to this proposition? [84] A. They again negated the proposal, because the problem of seniority came up again, and also that my time had not yet elapsed, which, you know, meant that I could not bid until the six-month period, or however many months it was, was up, so I was limited there.

Q. Was there anything else discussed as to how to eliminate your working on the Sabbath, March 8? A. Well, I again told Mr. Kussmann that I would be willing to work six days a week if possible just so I could have one day off without any extra pay, overtime pay, just so I could have the one Sabbath off, the Sabbath that I needed, and, if I recall the conversation properly, Mr. Kussmann said, well, if I worked six days a week I would be paid for it, and then Mr. Tinder said, well, that I couldn't because of the 40-hour work clause.

Q. The 40-hour work clause is what, sir? A. Well, any time over 40 hours would be paid on overtime, and this is your standard work week.

Q. Now, the way I understand this correctly, in September, I believe it has been stipulated to, you had a meeting with Mr. Kussmann and Mr. Tinder was present at that meeting. A. Yes.

Q. And Mr. Tinder was also present at the March 6 meeting? A. Yes.

[85] Q. Now, you then—first of all, was there anything or any other type of plan discussed by either Mr. Tinder, representing the Union, or Mr. Kussmann, repre-

senting TWA, to eliminate your working on the Sabbath, March 8? A. No, there was no excused absence mentioned, that I recall, and if there was, it would probably—this is just probably, in that my memory is so fuzzy on this one area. We had discussed excused absence in our September meeting, and Mr. Kussmann said, well, he couldn't, you know, continue to excuse me every Sabbath, that, you know, I would have to work it out.

Q. Now, on about March 21, there was another meeting of which of course the Court has an exhibit in front of it. At that time was Mr. Tinder present? A. Yes, sir.

Q. Was Mr. Kussmann present? A. No.

Q. The other individual who held the meeting was Mr. Butcher? A. Yes.

Q. I know yesterday the Court was concerned about in the exhibit dated March 21, 1969, from Mr. Butcher to yourself, there were certain things stated as a matter of record. Mr. Tinder was present at the March 6 meeting with Mr. Kussmann? A. Yes, sir.

[86] Q. He was also present with Mr. Butcher and yourself? A. Yes, sir.

Q. I believe the document speaks for itself as to the meeting on March 21, 1969. You did not work on March 8, is that correct? A. That is correct.

Q. You did not work on March 15? A. That is correct.

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[104] *Cross-Examination*

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[115] Q. (By Mr. Mollenkamp) Mr. Hardison, I believe you testified that in the spring of 1968 you began studying the [116] tenets of the Worldwide Church of God, isn't that correct? A. In the spring, I believe

I had started subscription to a magazine published by the Ambassador College, which is under the auspices of the Church, called "The Plain Truth". I was also reading some auxiliary material such as booklets on Evolution and so forth. It was a very, very light study. I was just getting into it as such. My mother, as I have previously stated, was already into it and of course she was trying to speed me up and telling me various doctrines and all.

Q. At that time was your degree of practice in that faith such that you needed to have Saturdays off to accommodate your religious belief? A. No, sir, my understanding wasn't that great at that time.

Q. When did that first become the case, namely, when under the practice of your faith did it become necessary for you to obtain Saturdays off in order to observe your Sabbath? A. Well, as my understanding grew deeper during that year, I became more deeply aware of what the Sabbath meant, what God commanded. In September I asked for a meeting with Mr. Kussmann and told him that, you know, this was going to be a problem, and I remember at that time my own conviction wasn't great, where I was going to say, [117] "I am going to take it off," because I thought at the time as long as I am working for it, God is going to forgive me. But as it grew, as my understanding grew, I saw that I was going to have to take it off, and so I put a bid in for the graveyard shift so that I could hold it. And this was during—when I was thinking, you know, well, as long as I am working for it, God is going to forgive me, and I still wasn't as such a hundred per cent convinced that it was, you know, commanded, and I should just not show up for work.

Q. Do you recall whether you worked on any Saturdays between the spring of 1968 and September or Octo-

ber of 1968 when you first came into the faith? A. Yes, sir, I did. I worked on Friday evenings, because I was on the twilight shift, and then on occasionally I would work overtime.

Q. Is there any single event under the practice of your faith that fixes a point in time when you must observe Saturday as a day off or Sabbath observance? A. Only when the understanding becomes so great that you see that this is a commandment of God, it is required, and that you are absolutely convinced that you've got to have it off. This was the point I was at, or just about at, I should say, in September.

Q. Was there a specific day in September when that happened? [118] A. Not that I recall, not a specific day.

Q. Is there anything in the records of your church which documents a specific day in September or October when you came into the faith? A. Well, I was not baptized until February of '69. My studying, you know, grew deeper and it grew deeper. I think in—well, around September I stopped working overtime on the Sabbath and just would work Sunday, but, yeah, I was still on, if I recall, the twilight shift and was still working a few hours.

Q. Did you receive Everett Kussmann's letter to you, dated October the 11th, which has been marked as Plaintiff's Exhibit 3 in this case? A. Yes, I did receive it.

Q. And Mr. Kussmann did indicate a willingness to consider your specific religious holiday requirements by that letter, is that correct? A. Yes, sir.

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[128] Q. (By Mr. Mollenkamp) Mr. Hardison, I believe you transferred to Building 2 on December 2 of 1968, is that correct? A. Yes, it was about that time.

Q. And was that a voluntary bid on your part? A. Yes, sir.

Q. You were not required by the company to transfer? A. No.

Q. What was your particular job in Building No. 2? A. Building 2? Well, I was in the Progress Department, and my specific job in that department was to run the train, as it was called, which is to go to each shop, pick up or deliver material, just continually make rounds in that fashion.

Q. And do you know where those parts are delivered to that you pick up? A. To the various shops for rework or reassembly of engines.

Q. And those parts eventually become incorporated in the [129] engines, is that correct? A. Yes.

Q. Now, were you the only one in that particular job of train men? A. Yes.

Q. Now, are Building No. 1, Stores Stock Room Section, and No. 2, Stores Progress Section, within separate seniority groups? A. Yes.

Q. What was your relative seniority within Building 1, Stores Stock Room Section, prior to your bid to Building 2? A. Well, it is kind of hard to remember. I wasn't on the bottom. I was about halfway up, I think.

The Court: Next to the bottom, weren't you, in Building No. 2? Isn't this the documentary evidence?

Mr. Mollenkamp: Well, my question is, what was his relative seniority in Building No. 1 before he transferred.

The Court: Much better.

Mr. Mollenkamp: That is correct, and he has testified—

The Court: Is there any disagreement about what the documentary evidence shows, and also that when he voluntarily moved and changed to Building No. 2, that

[130] he couldn't bump somebody to save it, and that the operation of seniority meant that he was going to be fired? Isn't that the undisputed fact?

Mr. Mollenkamp: It is so far as I am concerned.

The Court: Well, I don't think there is any quarrel with that.

Mr. Mollenkamp: Would you stipulate to that?

Mr. Pickett: I would, Your Honor.

The Court: You took the position that if he could save himself by reason of seniority, that is fine. If he couldn't, it was too bad. Isn't that true?

Mr. Mollenkamp: Yes.

The Court: All right.

Q. (By Mr. Mollenkamp) Isn't it also true, Mr. Hardison, that at the time you bid to Building 2, Stores Progress Section, that you could have gone to the graveyard shift or the twilight shift and not placed yourself within such a perilous position in terms of relative seniority? A. Well, as far as I know, the only opening was on days, because that is the only time the train ran, if I am not mistaken.

Q. Now, I believe you testified that in March you had a meeting with Everett Kussmann and James Tinder. That was March of 1969, is that correct? A. Yes.

[131] Q. Who initiated that meeting? A. Mr. Kussmann did.

Q. Do you know why he initiated the meeting? A. Well, apparently he had seen that the man below me was going on vacation and this man below me had Tuesday and Wednesday off and worked weekends, and that he realized that I would be required to work weekends.

Q. Now, was it Mr. Kussmann who suggested that your religious needs might be accommodated by a trade of shifts? A. I don't remember whether it was him or I, but it was discussed, yes.

Q. Was that agreeable to Mr. Kussmann? A. Yes.

Q. Was it agreeable to Mr. Tinder representing the Union? A. No.

Q. Was it also Mr. Kussmann who suggested that your religious needs might be accommodated by a change of sections? A. No, sir, I suggested that.

Q. Was this agreeable to Mr. Kussmann? A. As far as I remember, it was.

Q. And was that agreeable to the Union? A. No, sir.

The Court: Let me be sure that I catch this. Do I understand this testimony and anticipate what your evidence will be, that Mr. Kussmann was agreeable to a [132] trade with another employee, but this was vetoed by the Union.

Mr Mollenkamp: Yes, sir.

The Court: And you agree with that.

The Witness: Yes, sir.

The Court: All right.

Mr. Mollenkamp: And for further clarification, Mr. Kussmann was agreeable not only to a trade of shifts which would have been within the same section, but Mr. Kussmann was also agreeable to a change of sections; in other words, have the plaintiff go into a different section.

The Court: Can you tell me, also, will it be his testimony, and may we have a possible conflict in evidence, that it would have been agreeable to him, even though it may have been in an apparent violation of seniority?

Mr. Mollenkamp: I believe Mr. Kussmann's testimony will be that it was agreeable to him if the Union—

* * *

[142] Q. (By Mr. Mollenkamp) Mr. Hardison, I believe it is stipulated in our pre-trial order that you

did not report for work on March 8, March 15, or March 22 of 1969, is that correct? A. Yes, sir.

Q. On or about any of those dates did you attempt to bring a grievance arising out of either the company's or the Union's refusal to accommodate your religious needs? A. No, sir.

Q. Did the Union initiate a grievance in your behalf on or about any of those dates arising out of the company's refusal to accommodate your religious needs? A. No, sir.

* * *

Q. (By Mr. Mollenkamp) Now, at any time on or about those dates, namely, March 8, March 15, or March 22, did you seek or request relief from the Union Relief Committee? A. No.

[143] Q. And at any time on or about those dates did the Union seek relief in your behalf before the Union Relief Committee? A. Not that I know of.

Q. So that at no time prior to the discharge did you take any action by way of grievance or by way of action before the Union Relief Committee to resolve the question of your religious needs? A. I didn't file a grievance nor did I even know of a Relief Committee.

Q. Were you furnished with copies of the constitution and by-laws of the Union? A. Yes.

Q. Were you also furnished at the time of your employment a copy of your collective bargaining agreement between TWA and the IAM? A. Yes.

The Court: Did you ever read either one?

The Witness: Yes, sir.

The Court: Before this happened?

The Witness: Yes, I had read the contract and had glanced over the constitution.

* * *

[147] *Cross-Examination by Mr. Gordon*

Q. Mr. Hardison, when was the first time that the Union, that you know of, had knowledge of your religious requirements, as you asserted them? A. Well, Mr. Tinder was in my discussion with Mr. Kussmann in September, and as far as I know, that is the earliest.

Q. In September 1968? A. Yes.

Q. Now, it is true, isn't it, that you had a number of conversations with the Union—excuse me, with the company prior to that time discussing your religious requirements? A. Not in number. I had talked to Mr. Kussmann once previously to this.

Q. Well, you wrote him a letter, didn't you, on April 25 of 1968, saying as follows: "Would like to see you about a change in weekly days off. I wish to request either Friday or Saturday off from Friday Sunset to Saturday Sunset off, with the hours taken off Friday to be worked on Saturday evening or Sunday. My reason is I sincerely believe this is the Sabbath and no servile work may be [148] done then"? A. Yes, that is the letter I wrote.

Q. You wrote that letter to Mr. Kussmann on April 25, at least it was dated April 25, 1968? A. Yes.

Q. And you had a discussion with Mr. Kussmann concerning that letter at that time? A. I believe it was shortly after.

Q. And the Union was not present? A. I do not recall whether Mr. Tinder was there or not.

Q. When did you start changing your life style or your life habits, your habits of living, to conform with the requirements, as you understood them, of the World-wide Church of God? A. Well, I tried changing as soon as my understanding, you know, grew—grew, such as earlier that year in '68—not earlier than April, but

earlier than September, I came to find that certain foods should not be eaten, so I tried to discontinue all of that type of thing. Let's see, what else?

Q. This was when? A. This was prior to September of '68, where, as I say, I came into the knowledge that certain foods shouldn't be eaten, so I tried to abstain from those foods.

Q. Would this coincide with your beginning of studying of [149] the religion? A. Yes.

Q. When did you begin to study the religion? A. Spring of '68. This is, of course, what, brought the letter on.

* * *

[150] Q. (By Mr. Gordon) I believe you originally told me that to your knowledge the first notice that the Union had of your religious belief was in September of 1968, is that correct? A. As best I can recall.

Q. This was at a meeting with Mr. Kussmann and Mr. Tinder? A. Yes.

Q. What was discussed at that meeting concerning what your religion required and how long you had been in it? A. Well, I of course hadn't been in it as such, attending regularly or anything like that, but we discussed what the Sabbath was. I told Mr. Kussmann I was coming into a deeper knowledge of it and I could foresee a problem. At that time I believe I had already put in a bid for a different shift so I could observe the Sabbath, that I was going to try to work it out with the seniority system and, you know, try not to create an upset.

[151] Q. The fact of the matter is, you had talked to Mr. Kussmann previously without the Union? A. As far as I know, yes.

Q. Who called the Union into this meeting on September 6? Did you? A. I assume Mr. Kussmann did.

Q. Do you know whether it is the practice to call a Union Representative in when a matter concerning employment is discussed with an employee? A. It was the standard practice then.

Q. Who was Mr. Tinder, in terms of what he did? A. He was our Union steward for our group.

Q. Did he work fulltime at that? A. Yes, as far as I know.

Q. Well, the fact of the matter is, he was an employee like yourself. A. Oh, yes.

Q. And he worked fulltime in whatever job he performed for the company. A. Yes.

Q. And if a Union matter came up, he was called in as the lowest echelon of Union Representative, isn't that correct? A. Yes.

Q. And you knew you could go over his head if you didn't [152] agree with him, isn't that correct? A. Yes.

Q. And you knew that he didn't have the authority to establish Union policy, he only had the authority to be present during the discussion? A. No, I didn't know that he had the authority.

Q. Were you satisfied as a result of the consequences of the September 6 meeting? A. I was quite relieved. Mr. Kussmann indicated a willingness to let me have the annual days off, and like I had told him, I was going to try to work it out with seniority so I could have the Sabbath off, and I thought things would work quite smoothly.

Q. The Union voiced no objection over anything that was decided at that September 6th meeting? A. Not that I recall.

Q. On December 2nd, or thereabouts, sometime in December, I believe you switched seniority groupings and we have discussed that— A. Yes.

Q. —in some detail. Isn't it true that at the time of your bid from one building to another you discussed with your father-in-law at that time the fact that you would be put into a lower seniority grouping and that your chances of having to work weekends would be greatly [153] increased? A. If I talked to him about it at all, I told him that I was transferring over so I could work the day shift.

Q. Do you recall talking to him at all? A. Not any specific discussion, no.

Q. Do you recall ever talking to him about the consequences of your bid from one job into another? A. No, not unless he brought it up.

Q. Well, I am not asking who brought it up, I am asking if you have discussed with him the consequences of you changing from one seniority group to another. A. Not that I recall.

* * *

Q. And I don't want to put words in your mouth but I want to see if I understand what was talked about at that [154] meeting. As I understand it, it became apparent that you would have to work on Saturday and three alternatives were discussed; one, the swapping of a shift; two, the transferring of shifts; and three, working four days a week or six days a week not on Saturdays and if you worked six days either being paid six days a week, or if you worked four days a week, being paid for four days a week. Do you follow me? A. Well, most of that is correct. We did discuss shift swap. We discussed Section swap and I reiterated my willingness to work six days a week if need be to make up for the time I would be off or however we could work it out where I could work extra to do so.

Q. You also indicated a willingness to work four days a week? A. If I did, I don't remember it, but I might have.

* * *

Q. (By Mr. Gordon) Mr. Hardison, let me show you the deposition that we took from you in this case. You recall the taking of the deposition, don't you? A. Oh, yes.

Q. Let me direct your attention to Page 87, the line beginning at Line 21: "QUESTION: Did Mr. Tinder discuss with you the possibility of you taking time off and not being paid? ANSWER: I brought it up. I said, 'I will [155] be glad to take the time off. I don't want my pay if I can have the time off, that will be good enough.' Mr. Kussmann could not allow that." Were you asked that question and did you give that answer at the depoaition? A. Yes, as best I can recall, I did.

Q. Now, after a little dialogue we have just gone through, do you recall mentioning working four days a week and being off one day and not being paid? A. The only day I didn't want to be paid is the Sabbath I wouldn't be working. Like I said, I still don't recall speaking of a four-day week.

Q. In any event, when you discussed the swap of shifts, what was discussed on that particular question on March 6th? A. Well, in that I had worked days and talked to the man that was on graveyard shift. I found that he was unhappy with the shift, and this was brought up. I told Mr. Kussmann, with Mr. Tinder present, that if we could just swap me from the shift I was on to graveyard shift, this would be great because graveyard shift is considered first shift.

Q. Now, you hadn't actually worked out an agreement with the man on the graveyard shift, with swapping, did you? A. No.

Q. And you didn't know for a fact that he was willing to [156] swap? A. No, I didn't.

Q. What was Mr. Tinder's reaction to that discussion? A. He brought up that only if I could bump him out could I make that change.

Q. Would it be fair to say that he had no objection to you making that shift if the job opening was put up for bid and you were the most senior man to bid into it? A. That is correct.

Q. Now, what about the transfer of departments—was that basically the same thing, in other words, to shortcut it, that Mr. Tinder had no objection to your transferring shifts if the job opening was put up for bid and you had the seniority to bid into it? A. Well, if I recall the discussion correctly, I was under obligation to stay in my slot for X number of months until that time expired, then I could jump out, or bump out, if a job opening was available, say, back over in Building 1. And it was only according to that and seniority, could I have bumped into it.

The Court: Mr. Gordon, I still can't understand, and why I keep interrupting every counsel, but I would like to know your theory of relevancy of this line of examination.

Mr. Gordon: If I can ask one more question [157] I think it will become apparent. If it won't, then I would be glad to explain it, but I think there is one more question and I will get to it eventually.

The Court: All right, but don't get into the spot of the fortune teller. You have one question and then answer my question as to how this line of examination is relevant.

Q. (By Mr. Gordon) Isn't it true that if an employee in another shift or another department left that shift and that department and created a vacancy, that if you were

allowed to transfer to that shift or that department, outside of the seniority, then a more senior employee would be deprived of his seniority rights?

Mr. Pickett: I object to that on the ground, Your Honor, this gentleman, I don't believe, is qualified—

The Court: The objection will be overruled. Answer it and then you answer my question.

A. If the opening was a valid opening and I took it over, someone that had more seniority, yes, it would be in violation of his seniority rights.

The Court: Now you tell me what this is all about. What difference does it make if you are under obligation to follow the laws of the United States, and if the laws of the United States require a nondiscriminatory practice as far as religion is concerned?

[158] Mr. Gordon: The basis is that I suppose we just basically disagree on the statement of the issues in the case. There is no question, I suppose, if you frame any issue that is phrased in the terminology of, can you violate the law, then obviously we can't violate the law. That is what the trial is about.

The Court: And you have taken the position consistently from the first time you ever heard about it, and I say "you", I mean the Union, but the question was in complete exercise of a legal right in discharging this man for insubordination; indeed, the only argument you ever made to anyone was either a technical argument that one of your employees representing himself hadn't dotted all the i's and crossed all the t's and therefore cannot invoke the jurisdiction of this district court of the United States, or, secondly, you say, "Well, we will go through the form of representation by contending that discharge is a little rough in this case," and you submitted to somebody a set of arbitrations involving the question of whether or not someone at either La Guardia or Ken-

nedy Airport was wearing an unauthorized jacket and he got fired and it was taken to arbitration and the arbitrator held, with great reluctance, that the determination of whether somebody ought to be fired for wearing something other than a company jacket [159] was really too rough a penalty because other people in the past had worn khaki jackets and therefore modified the discipline.

You didn't raise any question at any time as to the legality and the right of the company to fire him for insubordination under the circumstances of this case. Indeed, you agreed with it and you maintained, and you maintain consistently now, just exactly as the company does, that it is an undue hardship as a matter of law to make any accommodation contrary to seniority requirements by what I assume is the handful of Sabbaticals that are in the employ of TWA, and you continue to maintain that position.

Mr. Gordon: Well, it is just not the way that I would state our position.

The Court: No, you would state your position, and all kinds of hocus-pocus, and you would try to get this Court, you would try to get this Court to make some sort of a finding of fact that is directly contrary to the written position that you have taken.

I couldn't describe better than someone in the lower echelon who took a first step on behalf of this man as to what kind of case is involved here, and that is, "It is a sad case, a terribly sad case."

Mr. Gordon: Well, unfortunately, as far as I [160] know, we don't have any jurisdiction to protect any employees against sad cases.

The Court: Oh, no, and you claim you have no duty to go after an employer who may have violated the laws of the Congress of the United States, because you say, "That law cannot be read as being a part of our contract.

Now, we are very, very interested if there is a discharge contrary to our agreement, but we do not consider the Civil Rights Act of 1964 as a part of our agreement,"—

Mr. Pickett: I would like—

The Court: —"therefore, you may disregard it with impunity."

Mr. Gordon: That hasn't been our position as far as I am concerned.

The Court: Why isn't it your position right now? When have you ever said that the discharge for insubordination by TWA is contrary to law?

Mr. Gordon: Pardon me?

The Court: I say, when have you ever said that the discharge by TWA, even remotely contrary to law—

Mr. Gordon: There is some basic disagreement, I suppose, on whether you have to say what I would characterize as some sort of magic words in using the Title 7 context or whether you can go ahead and take [161] actions which would still be legal under Title 7.

The Court: I will just ask you a very, very simple question, and if you don't understand it, you have me rephrase it. It is my understanding that the Union's position throughout this controversy, and the Union's position right now, is that TWA took fully legal action when they discharged the plaintiff in this case, and that there was no possible violation of the Civil Rights Act of 1964.

Mr. Gordon: That is not correct.

The Court: All right, you tell me then when you say TWA may have violated the law.

Mr. Gordon: I can tell you that we never said that TWA violated Title 7, if that is what you are getting at.

The Court: Yes, and you give me a negative answer as to what your position is, but when I ask you to specify

when TWA may have violated the law, you say, "Well, that has just never happened yet."

Mr. Gordon: No, I say that we never expressly articulated our opposition in terms of a violation of Title 7, that is true, and we can stipulate to that if the Court wishes. We did object to the discharge. We objected to it on March 31, when it occurred. Under the contract the procedure that has been followed is that [162] the discharge grievance goes to the district.

The Court: Mr. Gordon, does the Court misunderstand your position in this case when you contend that neither TWA nor the Union violation Title 7 of the Civil Rights Act?

Mr. Gordon: That is correct, but for a different reason.

The Court: I understand, but isn't it your position, regardless of what the reason is, that neither you nor TWA ever violated Section 7 of the Civil Rights Act?

Mr. Gordon: My position is that the Union has never violated Title 7 of the Civil Rights Act, and the company will have to defend for it.

The Court: And your position also is that TWA didn't violate it?

Mr. Gordon: I think so.

The Court: All right, on cross-examination I find out that what I stated as to my understanding of your position is accurate.

Mr. Gordon: But whether TWA violated Section 7 or not is not dispositive of the question of whether the Union has violated Title 7.

The Court: Well, you don't contend anybody violated it.

[163] Mr. Gordon: Well, my argument, I hope, is more sophisticated than that.

The Court: Well, I don't care whether it is sophisticated or not. Sometimes unsophisticated arguments are correct. When somebody has to get sophisticated, it becomes a little difficult to get the sophistication off.

You know the origin of sophistication, do you not?

Mr. Gordon: I think I want to change my adjective.

The Court: Well, you better read your Plato and Aristotle to find out who the Sophists were in ancient Greece. It is my understanding throughout this case that the consistent position of both TWA and the Union is that they never violated Section 7 of the Civil Rights Act at any time.

Mr. Gordon: All I can ask is about four sentences worth of explanation. I just can't give you—

The Court: Well, you can have five or six. Is my understanding correct? Let's take it just to the Union itself.

Mr. Gordon: Fine.

The Court: You are contending that the Unions you represented never at any time violated Title 7 of [164] the Civil Rights Act of 1964.

Mr. Gordon: That is absolutely correct.

The Court: That is exactly correct, and that is the position that you took before every administrative body, it is the position that you took before TWA; indeed, you said to TWA, "You didn't violate, either. We are both as clean as the driven snow, because it is an undue hardship for us to make any accommodation in connection with this particular case. Now, we haven't tried very hard, but we don't have to try very hard, because it is a per se hardship to violate seniority."

What did the Union do to try to find somebody to swap with this young man? The answer is, "Nothing." Isn't that true? You said, "We didn't have to do that"?

Mr. Gordon: No—

The Court: Well, what did you do?

Mr. Gordon: We said that if the job opening ended up—and this is the point we started off with, maybe if I can make this—

The Court: Why don't you just answer my question, what did the Union to do inquire whether anyone in their membership would be delighted—

Mr. Gordon: Your Honor—

The Court: —to swap with this guy, irrespective of seniority.

[165] Mr. Gordon: We don't start out from the basic set of assumptions. If I could just clarify one point. If I don't direct myself to it, I will be glad to try. It was not the man who swaps jobs to swap. When a vacancy opens up, the most senior employee is entitled to the job. We cannot say that Mr. Smith over here has 30 years of seniority—

The Court: Mr. Gordon, let's get this witness completed, because I am trying to—

Mr. Gordon: I'm sorry.

The Court: —to get some theory of fact, and I asked you a specific question as to what the Union did, and I asked you that question for the reason that I wanted you to make inquiry of this plaintiff, "Did you know that we circulated among our membership a request of people that regardless of seniority would like to get the weekend off," and to see whether he knew about that and whether he willfully, knowingly and intelligently said "No, I don't want to do that. I want to stand up and be a martyr and be fired because of my belief, because of my religion."

You can go ahead and talk to him, because I want to find out what they did do. It is my impression that you said, "We don't have to do anything, and therefore we didn't do anything." If you didn't think you [166]

had to do anything, why in the world would you do something?

(Off-the-record discussion between Mr. Mollenkamp and Mr. Gordon.)

Mr. Gordon: Your Honor, I could tell you what I think the facts are, if that is what you are aiming at. We were totally agreeable to any adjustment that could be made for the plaintiff as long as it didn't deprive another employee of the seniority rights.

The Court: I understand that.

Mr. Gordon: Okay, that included taking a day off—

The Court: And what you are saying is that if it did, then all bets are off?

Mr. Gordon: Well, Judge, it is hard to—I would like to tell you what we said. We said if a job opening opened up, if he was the most senior employee, then he could have it. Now, if that is wrong, it is wrong, but that was our position.

The Court: Why, certainly, that is your position in connection with any substitution, religious reason or any other reason. That is straight Union doctrine. Do you think this is the first labor case this Court has ever had?

Continue the examination of the witness. I [167] want to get him off the stand so we can get on to getting into this record what other additional relevant evidence in addition to that which is stipulated and that which is clearly apparent from the documentary evidence in this case, which I have studied.

Q. (By Mr. Gordon) Mr. Hardison, I want to go back to the March 6th meeting. I believe you said that on the suggestions concerning shift changes and department changes, I believe your terms were that the Union vetoed that, is that correct? A. Yes, sir.

Q. Do you know what power the Union has to veto acts of management? A. Well, Mr. Tinder said that,

you know, if it could be worked out, seniority, fine; but, you know, just to take—put me in a slot such as the graveyard shift, or if the man was willing to change, fine, or if I could go to a different department, if there was an opening fine; but to take me unnaturally out of my slot and put me unnaturally in a slot—

Q. That is not really my question, and maybe I didn't phrase it properly. My question really is, couldn't the company have done what it damn well pleased, even over the Union's objection? A. I think they could have, yes.

[168] Q. The company runs the plant out there, don't they? A. Well, they are supposed to, yes.

Q. Now, was there any job up for bid that you know of on March 6th? A. Not that I know of.

Q. In fact, you know there was no job open for bid? A. Yes.

Q. And in fact, you know that if there would have been a job open for bid, you wouldn't have had the seniority to bid them? A. I might have had the seniority. It would have, of course, depended upon the job.

Q. Let me direct your attention to Page 89 on the deposition, starting at Line 5: "QUESTION: Actually I probably misspoke. I suppose it would be fair to say the Union had no objection to you changing shifts if you were the most senior man on the bid? ANSWER: If I could bid into something else, that would be correct, but there was nothing I could bid into. QUESTION: Were the jobs up for bid? ANSWER: No, there were no jobs up, was one problem. There was no jobs up for bidding to start with, and secondly, I did not have the seniority to bid them." Were you asked those questions and did you give those answers? A. Yes.

[169] Q. Were they true when you gave them? A. As far as I recollect, yes.

Q. And do you recollect that they are true now?

The Court: Mr. Gordon, how can there be any dispute about that?

Mr. Gordon: Well, I don't think it has been established that there were no jobs open for bid. I'll go on.

Q. (By Mr. Gordon) After the March 6 meeting were you satisfied with the way things stood? A. No, sir.

Q. Why not? A. Well, because I was going to be required to work on the Sabbath.

Q. Now, you kn[illegible]v, did you not, that you could file a grievance if you didn't like something that was going to happen to you out at TWA? A. Yes.

Q. But you didn't file a grievance, did you? A. I believe I spoke to Mr. Tinder about obtaining other counsel or in some way, you know—

Q. Did you know that you could file a grievance? A. Yes.

Q. Did you know that Mr. Tinder was overseen or supervised by the Grievance Committee? [170] A. Yes, I believe I know that.

The Court: Did Mr. Tinder or any member of the Union ever indicate to you that they thought that you may have some rights that were protected by the 1964 Civil Rights Act?

The Witness: No one mentioned it.

The Court: Did they ever mention it at any time, ever mention the Civil Rights Act at any time?

The Witness: No, sir.

The Court: Talking seniority all the time.

The Witness: Yes, sir.

Q. (By Mr. Gordon) After the March 6 meeting, you knew you could file a grievance. A. Well, yes, I thought I could.

Q. And did you know also that under the collective bargaining contract, only an employee can file a grievance? A. Yes.

Q. And did you know that the Grievance Committee was Mr. Tinder's superior in matters regarding grievances? A. Yes.

Q. And you knew where the Grievance Committee was? A. No.

Q. You didn't know where the Grievance Committee was? A. No, sir.

* * *

[186] Q. Do you recall the Grievance Committee telling you at that meeting that if you wished to go to court, that that was your right? A. No.

Q. At the March 31 discharge hearing, I think we can agree that the Union argued that your discharge was too severe a penalty, is that correct? A. Yes.

Q. At any time did the company—at any time during that meeting did the Union indicate to you or to the company that they thought you should be discharged? A. No, they didn't—you know, the Union didn't say discharge him. They just said they thought discharge was too severe a penalty.

Q. Did they ever agree with the company that they thought [187] you should be discharged? A. No.

Q. You were present at the hearing, of course? A. Yes.

Q. You didn't—obviously you didn't bring up that you thought your Title 7 rights were being violated because you have just testified you didn't know it at that time. A. No, I wasn't called upon for any testimony.

Q. Now, if your deposition reflects that you did indicate to the Union that your Title 7 rights had been violated at the March 31 meeting, then your deposition is incorrect as to that fact? A. Well, if I said it, I was just going on, you know, what I thought it would be true at that time.

Q. But you are testifying now, and the fact is now, you now understand it, that at the March 31 meeting with the Union you did not tell them that your Title 7 rights had been violated, because you didn't know at that time what federal law provided? A. Right. Like I said, I don't recall ever saying anything about my civil rights.

Q. Now, your discharge was effective on April 2, is that correct? A. Yes, sir.

Q. And that decision was made by Mr. Frey? [188] A. Yes.

Q. And he is an agent of the company? A. Yes.

Q. And to your knowledge the Union didn't encourage him to reach that decision? A. Not to my knowledge.

Q. Do you recall talking to the Union Grievance Committee on the way out of the hearing on March 31? A. No.

Q. Do you recall not talking to them after the meeting? A. I don't recall a whole lot since it has been too long.

Q. All these factors are just so vague in your mind that you can't remember too well, one way or the other? A. I don't remember any subsequent conversations, no.

Q. There could have been some and you don't remember. A. As I said, it is possible, but I don't recall any just now.

Q. You did recall a subsequent conversation with Mr. Box in which your resignation was discussed, as you described to Mr. Pickett? A. Yes.

Q. That is all you remember right now? A. Yes.

Q. Isn't it true that the subject of your discharge was not—I'm sorry. Isn't it true that the subject of your [189] resignation was not discussed after the discharge hearing but before? A. That I talked to them about resigning before the discharge hearing?

Q. Yes. A. No, I don't think I did.

Q. Didn't the Grievance Committee tell you when you met with them when you discussed possible defenses and possible alternatives, that one possibility was a resignation, and if you went ahead with the hearing that they had never known the company to allow a resignation after they had issued a discharge letter? A. If they said it, I don't recall it.

Q. Following the time that you received your discharge letter, did you ever have a meeting set up with Joe Bowman? A. No, sir.

Q. Did you know that the grievance pursuant to the collective bargaining contract automatically transferred from the local to the district after your hearing? A. No.

Q. You didn't? A. No.

* * *

[193] Q. Did any steward, Grievance Committeeman, local Union official, district Union official, international Union official, ever make any remarks derogatorily against your religion? A. None that I recall.

Q. That would be something that would stick out in your mind, since you regard your religion rather seriously? A. I imagine it would be.

Q. Did the Union ever object to you working out some sort of adjustment to your schedule as long as that adjustment did not deprive a more senior employee of his rights under the contract? A. No.

Q. And if you were allowed to bump out of the seniority, either to transfer shifts or bid shifts under the contract, that you weren't entitled to, it would necessarily mean that an individual who didn't share your religious beliefs would be deprived of his rights that he assumed he was entitled to under the contract? A. That is true.

Q. Didn't you go back to the company following your discharge and asked to be rehired? A. Yes.

Q. And was the Union present at that time? [194] A. No.

Q. Did the company accept your application for rehire? A. No.

Q. Was that the company's decision and the company's decision alone, as far as you know? A. As far as I know.

Q. I asked you if the Union ever made any derogatory statements directed against your religion. Did anyone in the Union ever make any derogatory statements directed at you? A. Well, I don't recall any other—no, I don't recall any direct ones.

Q. Would you say that your relationship with these Union people at these various meetings that you had with them was cordial? A. Yes.

Q. There wasn't any hostility at those meetings directed toward you? A. None that I recall.

Q. Do you remember how long the district has to appeal a discharge under the collective bargaining contract? A. No.

Q. Did you make any effort to find out under the contract? A. Not that I recall.

* * *

[198] *Redirect Examination by Mr. Pickett*

Q. Mr. Hardison, at any time did anyone ever explain to you what the Union Relief Committee was? A. No, sir.

Q. To this day do you know what it is? A. No, sir.

* * *

DEPOSITION

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MISSOURI,
WESTERN DIVISION

Civil Action

No. 20096-1

LARRY G. HARDISON,
Plaintiff,

vs.

TRANS WORLD AIRLINES, INC. AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT 142, AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS LOCAL 1650,
Defendants.

THE DEPOSITION OF THE PLAINTIFF, produced, sworn and examined on behalf of Defendant TWA, pursuant to Notice to Take Depositions, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of Tuesday, August 15, 1972, at the offices of TWA, 1307 Baltimore, in the City of Kansas City, in the County of Jackson and State of Missouri, before me,

GERALDINE DUEBBERT
of
MILES and BEHRENS,
Shorthand Reporters,

a Notary Public in and for the County of Jackson, State of Missouri, in a certain cause now pending in the District

Court of the United States for the Western District of Missouri, Western Division, wherein LARRY G. HARDISON is Plaintiff and TRANS WORLD AIRLINES, INC., AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT 142, AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS LOCAL 1650 are Defendants.

[2] APPEARANCES

For the Plaintiff:

Mr. William H. Pickett
1100 Home Savings Building
1006 Grand Avenue
Kansas City, Missouri

For Defendant Trans World Airlines:

Mr. James J. Mollenkamp
Room 1-323
Kansas City International
Airport

For Defendants International Association of Machinists and Aerospace Workers District 142, and International Association of Machinists and Aerospace Workers Local 1650:

Messrs. Jolley, Walsh,
Gordon and Staab
606 Argyle Building
306 E. 12th Street
Kansas City, Missouri
By Mr. Michael D. Gordon

* * *

[3] LARRY GLENN HARDISON,

of lawful age, being produced, sworn and examined on behalf of Defendant TWA deposeth and saith:

Direct Examination by Mr. Mollenkamp

* * *

[23] Q. I believe that is enough. A. Okay.

Q. What holidays other than the Sabbath are celebrated by your church? A. The first day of Days of Unleavened Bread, and the last day.

Q. Does that fall on a certain calendar day within the month? A. No, sir, it is a movable date.

Q. Between what months? A. Usually between April and May. It can be as early as March, and the one following those two days.

Q. Before we get to that, do you recall when that day fell in 1968? A. No, sir.

Q. Do you remember when it fell in 1969? A. April the 3rd.

Mr. Gordon: Which one are we talking about, 1969?

Mr. Mollenkamp: Yes.

A. That is when I was discharged, yes.

Q. So, the day after your discharge, there was this holiday, the name of which appears in the record, the First Day of Unleavened Bread, and the last is one day? A. The First Day of Unleavened Bread and the Last Day of Unleavened Bread are separate dates.

Mr. Gordon: One occurred on April 3rd?

* * *

[29] Q. Has there ever been a Sabbath Day on which you have performed work since September of 1968? A. Since I was into the church fully, no.

Q. I am not sure that I understand what you mean by "into the church fully", will you explain that? A.

In September of '68, as I have said, I was coming into the faith. I don't recall if there were any Sabbath Days in September that I did work. I believe there were, but that is because I was not completely convinced about the Sabbath and secondly, I know that I transferred to the twilight shift to get away from full time work.

Q. So you believe you did work on a Sabbath Day in one or more occasions in September of 1968? A. It is quite possible, yes.

Q. Have you ever worked on any other Sabbath Days other than in September of 1968? A. None.

Q. Is it possible by applying to your minister or some other official within the church to be exempted in such a way that you can work on a Sabbath Day? A. There are no exemptions.

Q. Not even under emergency circumstances of some type? A. As far as regular work, no.

* * *

[55] Q. Let's see, to go back for a moment, when you started your employment with TWA, you started as a Stores Clerk in Building 1, is that correct? A. Yes, sir.

Q. How long did you work in Building 1? A. Well, I started in the Receiving Department and then I transferred to stockroom, so I was there, oh, about let's see, I started in '67, until about the end of '68.

Q. What kind of work was done in Building 1 in the Stores Department? A. In Stores, well, at the time the Receiving Department had a temporary setup there because of construction in Building 2. The company material was shipped from Building 1. There was Progress Department, which of course, moves material from one shop to another shop or one stockroom to another stockroom, and then there are other stockrooms of various types and natures.

Q. You say materials, you mean aircraft parts? A. Yes, sir.

Q. Are these parts used in the maintenance of TWA's airplanes? A. Yes, sir.

Q. Is the Stores Department open seven days a week? A. There are Stores Clerks there seven days a week, yes.

Q. So that this supply of aircraft parts is something that [56] is done seven days a week? A. Yes, sir.

Q. And there are three shifts per day, is that correct? A. That is correct.

Q. So that it is also a 24-hour a day activity? A. Yes.

Q. And to your knowledge, is this Stores Department open all year around? A. Yes, sir.

Q. So that there is always some person in the Stores Department who is available at any hour any day in the year for the purpose of supplying aircraft parts for maintaining aircraft? A. Yes, sir.

Q. Now, what was your specific job in Building 1? A. Well, to start, I was receiving on the what is called, Rimat Red Line, or company material coming in from the field, and then I transferred to the stockroom in Building 1 and was assigned to the stockroom at Bay 6 and also at the Radial and Hydraulic Parts Stockroom.

Q. Is there any on-the-job training in connection with those jobs? A. Yes, sir.

Q. Will you describe what that training is? A. Well, to start from hiring, TWA has formal classroom training [57] for half a day for a week, and then has you on the job in the various departments, stockroom, receiving, shipping for a week, and then you are assigned to a definite department, such as Receiving-Shipping Stockroom or whatever the case, and then, of course, you learn this specific job itself, the stock classes involved or the various shops you have to go to or whatever.

Q. How many other people in Stores held the same job that you held in December of '69 before you transferred to Building 2? A. In Receiving, oh, in Stockroom, I am sorry. I would estimate 20 just in Building 1.

Q. Did they all work on the same shift or were they assigned among different shifts? A. They were assigned among different shifts.

Q. How many would be on duty in different shifts? A. Let me correct it, 20 per shift. There would be, say, 40, 50 people and say 20 for the two main shifts.

Q. Can you describe the seniority grouping within Building 1 Stores Department, are all members of Stores in Building 1 part of the same seniority grouping? A. No. Well, there is the main seniority grouping that covers everybody in Stores and within your classification such as stockroom and Progress Department, various things like that, there is more minute breakdown.

[58] Q. Do you recall how many were in your seniority grouping in December of '68? A. No, sir, I don't.

Q. Do you recall what your relative seniority was within the grouping? A. I was about halfway up from the bottom, I think.

Q. With this seniority did this enable you to get days off which included your Sabbath? A. Yes, sir.

Q. So that between the time that you came into the faith in September of '68 until sometime in December of '68 when you transferred out of Building 1, your seniority enabled you to have days off which you included your Sabbath? A. Yes, sir.

Q. Now, why did you transfer to Building 2? A. Well, I was married and I was on the graveyard shift in Building 1, and at the time I could have held the day shift in Building 2 with my seniority and being as day shift is more of a convenient time when you are married, I transferred.

Q. Isn't it true that Building 2 had a different seniority grouping than Building 1? A. Yes.

Q. So that by transferring to Building 2, you gave up seniority you had in Building 1 and you fell within new [59] seniority grouping in Building 2? A. Yes, new grouping, yes.

Q. Was your seniority lower in Building 2 than in Building 1? A. Yes.

Q. What was your seniority in Building 2? A. I think I started out third from bottom and ended up second from bottom.

Q. When, you say "ended up second from bottom", that would be in March of '69. Apparently prior to then a junior man had resigned so there was only one man junior to you within the Stores Department in Building 2? A. Yes, sir.

Q. Now didn't this give you some cause for concern as it affected your ability to get days off for Sabbath observance? A. No, sir.

Q. Well, going into a job where you have less seniority, isn't it true that you can anticipate junior people having vacation shifts or being unable to attend work that might require your having to work in their place? A. Yes.

Q. And being second from the bottom of the seniority list did not trouble you in that respect? A. No, sir.

Q. Isn't that what happened in March of '69, that the junior [60] man went on vacation and that necessitated your working in his place? A. That is right.

Q. And to work in his place, you would not have had days off on your Sabbath? A. That is correct.

Q. So it turned out to be a problem? A. Yes, sir.

Q. Isn't it true that in general the more senior employees do not prefer to work on week ends, namely Saturdays and Sundays? A. Yes, sir.

Q. So that being junior in the department, you might expect some Saturday and Sunday assignments? A. I could have.

Q. But you transferred into Building 2 in any event, so that you could get the day shift in preference to night shift or twilight shift in Building 1? A. I was on graveyard, yes, I did transfer to get the day shift.

Q. Now, in a case such as the one we referred to where the junior man went on vacation, do you know whether the company can require an employee more senior than you in your seniority at that time, to fill the position of the junior man on vacation without first determining your availability [61] to fill that position? A. Let me see if I have got the question straight. Do I know if the company could require someone of higher seniority than I to fill my position if I had to work, that is basically the question, or have I left out something?

Q. Perhaps the Court Reporter should read back the question.

(The question was read by the Court Reporter.)

A. No, I don't.

Q. (By Mr. Mollenkamp) Well, in other words, can the company take a man out of seniority and require him to work in place of a junior man such as yourself in this incident?

Mr. Pickett: I don't want to unduly interrupt. I object to the question being unduly redundant, repetition. He has answered the question.

A. According to seniority system, they can't require anybody above me to work.

Q. (By Mr. Mollenkamp) How, in fact, are job assignments made, aren't they made through the Union steward? A. The specific job assignment or you mean to go from one classification to another?

Q. Let me rephrase the question, if I may, for clarification. Isn't it true that the Union steward has the seniority list and it is the Union steward who determines who fills a certain job in case of vacancy, by referring to that seniority list? [62] A. Yes, I believe it is.

Q. How many other people in Building 2 had the same job description that you had in March of 1969? A. You mean just the title Stores Clerk, is that what you mean or the specific job I was doing?

Q. Let's take both. Let's take Stores Clerk first. A. Okay, as Stores Clerk in Building 2, there were approximately 150 men. As my particular job, the specific function that I did, I was the only one.

Q. What was that specific job? A. Well, what we call it was a trainman where I stopped at every shop and transferred material.

Q. What training did you receive for that job? A. The same that I had outlined before, you know, when first hired I went through the Stores Clerk class and received on-the-job training as far as operating equipment goes and all of that, and then the man that I replaced showed me where all of the shops were and told me my basic duties.

Q. Now, when you were asked to fill in for the man on vacation in March of 1969, what kind of work would that have been? A. Well, he worked a specific shop such as machine shop and just delivered their materials and brought them supplies and on the weekend, I think he just handled the stockroom, the tool stockroom.

* * *

[64] Q. Directing your attention to Paragraph No. 9 of the attachment, it indicates that you had discussions centering around transferring you to a shift or other group assignment where you would not be required to work on a Sabbath Day, is that correct? A. Yes, sir.

Q. And with whom were those discussions? A. That is that same discussion I had spoken of about talking to Mr. Kussman and Mr. Tinder.

Q. And you further indicated in this attachment that even suggestions acceptable to the employer TWA or to yourself were vetoed by the Union Steward, is that correct? A. Yes, sir.

Q. Will you describe what those suggestions were, please? A. One was a suggestion of just changing shifts where I was willing to go on graveyard shift. I had talked to the man that was on graveyard and he was unhappy about it. I suggested to Mr. Kussman about a transfer there if he was willing, and the Union would go along with it. Mr. Tinder said, "No, you can forget about that," regardless of whether he was willing to go or not, unless I could bid it. He had higher seniority than I, so I could not bid it.

Q. Was that suggestion acceptable to Mr. Kussman? A. Yes, sir. To continue, I suggested to Mr. Kussman a transfer back to Building 1 where I had come from, stockroom [65] or whatever I could get in at the time would be acceptable to me because I was planning on bidding back in anyway, as soon as my time elapsed from my last bid until I was available for another. The Union said I would have to await my time. When the time would be up, I was fired.

Q. Before your employment was terminated, was that suggestion that you have just related acceptable to Mr. Kussman? A. He said he thought it could be worked out. He did not say "yes" or "no", but he thought maybe that could be worked out, but Mr. Tinder said, no, I would have to wait my time.

Q. These conversations were held in March of '69, is that correct? A. Yes, sir.

Mr. Mollenkamp: I think that is all of the questions I have.

Cross-Examination by Mr. Gordon

* * *

[80] Q. Do you feel that I would be violating God's—strike that. Do you feel that other employees at TWA, if they [81] worked on weekends would be violating God's Commandments? A. Other TWA employees?

Q. Who do not belong to the World Church of God? A. It is Sabbath Day. If they work on it, they are violating it.

Q. Do you have objections to other employees filling your place? A. No, they can if they want to.

Q. I think you told Mr. Mollenkamp about a conversation you had with Mr. Kussman in September of 1968. A. Yes, it was late September.

Q. And in that discussion you told him you were coming into the church or something to that effect? A. Yes, I told him that I was studying the Bible and that I believed that there would be a problem concerning the Sabbath Day, and I would like to work with the company and try to get it solved.

Q. Was the Union present when this conversation took place? A. Yes, sir.

Q. Did it make any objection to anything that was said in that discussion? A. Just stipulated that it had to be through the seniority system.

Q. Who was present? A. Jim Tinder.

[82] Q. Was this the first notification that the Union had that you were becoming interested in this religion? A. I think I talked to Jim prior to my going down to see Mr. Kussman, but not positive.

Q. Approximately the same day or shortly before? A. Shortly before.

Q. Do you recall anything that you said to him or he said to you in that conversation? A. No, I think

I was informing him that I would be trying to get this appointment.

Q. Did he or anyone else from the Union tell you they had anything against you joining this new religion? A. No.

Q. So you had a conversation—I am skipping back and forth—you had a conversation with Mr. Kussman and Mr. Tinder sometime in September of 1968? A. Yes.

Q. And during that conversation Mr. Kussman told you that he would give you an excuse for your holidays? A. Yes, sir.

Q. The Union raised no objection to that procedure? A. No objection.

* * *

[85] Q. It is my understanding that this is the only time outside [86] of September 1968, that the Union had been present when your particular religion problem was discussed? A. Yes.

Q. We are up to a day or two, I assume, prior to March 8, 1969. Just tell me what was said in that conversation. A. Well, I got down there and—

Q. Where was there? A. In Mr. Kussman's office.

Q. Who called the meeting? A. Mr. Kussman did.

Q. Do you know why, was it because he heard you had the problem? A. He apparently saw the schedule change and wanted to talk to me about it because this is pretty much what he said when he talked to me.

Q. Tell me what everyone said, to the best of your recollection. A. He said—

Q. Mr. Kussman. A. Mr. Kussman said he saw I was scheduled to work on Saturday because of vacation scheduling and that because of our previous discussion that he wanted to see if we could not work out a solution, and I said, "That is fine with me. I am willing to go along with anything that is reasonable," so I told him

that if nothing else I would [87] be glad to take the time off and not be paid for it, but he said, "Well, how about changing shifts?" I said, "That is okay with me," and then, as I previously said, I told him of the man on the graveyard shift who disliked the shift and I suggested that maybe we could make a transfer there and not have any paper work go back and forth or any other problems, just swap people, and Mr. Tinder said no, it would have to go through the regular procedures and that the only way I could do was bid into it, and as I previously stated, this man had more seniority than I, so I could not bump him out of position. I suggested a transfer to different grouping, preferably back to Building 1. Most anywhere would be acceptable. Mr. Tinder brought up my time had not elapsed from my last bid until I could bid again, and therefore, I would have to wait until my time had elapsed so I could put in a bid to get out of my situation. I told him, "I am sorry but I can't be here on the Sabbath. If we can't work out something like that, I can't work," and that is basically the whole conversation.

Q. Did Mr. Tinder discuss with you the possibility of you taking time off and not being paid? A. I brought it up. I said, "I will be glad to take the time off. I don't want my pay if I can have the time off, that will be good enough." Mr. Kussman could not allow [88] that.

Q. What was Mr. Tinder's reaction to that proposal? A. As far as I know, he was acceptable to that.

Q. And I think you mentioned the fact that your time had not elapsed from your last bid, so Mr. Tinder said it would have to elapse under his interpretation of the Constitution until you would be eligible to rebid? A. Yes.

Q. How much time did you have to go? A. I think it was a month or two. I think there is a six months' period between a group change like I had made from stockroom to, you know, Building 2 Progress. I think it is six months and I had two or three months yet to go.

Q. Did Mr. Tinder express any objection once you waited that period to allow you to transfer to different grouping after your time elapsed? A. No objection.

Q. Did he make any suggestions to you about what you might do in the meantime until your lapsed time had run out? A. No, sir.

Q. Would it be fair to say at this meeting with Mr. Kussman, Mr. Stewart and Mr. Tinder, that the Union had no objection to your taking the time off without pay, if that is [89] what you wished to do, but objected to your changing shifts or transferring to different groups because under their interpretation of the contract it was not permissible? A. That is correct.

Q. Actually I probably misspoke. I suppose it would be fair to say the Union had no objection to you changing shifts if you were the most senior man on the bid? A. If I could bid into something else, that would be correct, but there was nothing I could bid into.

Q. Were the jobs up for bid? A. No, there were no jobs up was one problem. There was no jobs up for bidding to start with, and secondly, I did not have the seniority to bid them.

Q. When you talk about transferring to a change of shift? A. Yes.

Q. I am just confused as to how Mr. Kussman could have suggested that if there was not a job opening. A. Well, like I said, you know, we were just going to swap if the guy was willing to transfer willingly to vacate his

position, and they would put me in his just to make a swap and all without having an official opening.

Q. In other words, what was really discussed on changing shifts was a swap with you and some other fellow? A. Right.

* * *

[91] Q. At the higher levels within the grievance procedure and [92] within the union itself there were numerous people at the Plant that had more authority than Mr. Tinder? A. The Grievance Committee did.

Q. Do you know anybody in the Grievance Committee that worked in close proximity to you? A. None.

Q. Do you know where the Grievance Committee was, if you wanted to talk to them? A. I never had any use for them.

Q. Do you know where they were? A. Yes.

Q. When did you find out? A. Prior to my leaving.

Q. Did you know how to get ahold of the Grievance Committee or Union official? A. Yes.

Q. The office is in the Plant, it is not a big secret how to get ahold of the Union? A. I guess not.

Q. I believe that was about it for the discussion that happened with Mr. Kussman and your Supervisor, John Nicholson, and immediately thereafter March 8 happened and you called in and told them you wanted the day off for personal business? A. Yes.

* * *

[107] Q. Did they ever object to your taking off a day without pay? [108] A. No, sir.

Q. So it would not be overruling the Union by instructing supervisors to allow you to take the Sabbath Day off or leave early because the Union never asked for that to begin with. A. That is not what I mean by overruling was to allow a shift change or something.

Q. The company could have allowed you a shift change without the permission of the Union, couldn't they? A. I thought they could.

Q. The company could have found in your favor at the discharge hearing if it wanted to, couldn't it? A. As best I thought they could.

Q. And the company could have rehired you subsequently without the Union? A. Yes.

Q. In fact, the Union has no effect at all, to your knowledge, on the company's hiring practices, does it? A. General hiring practices, no. On this I have no idea.

Q. You have no reason to believe the Union tried to influence the company not to rehire you at the later time? A. No.

Q. I think you told Mr. Mollenkamp about an incident, I am not sure exactly when it occurred, I don't think we have talked about in which it was suggested that you call in [109] sick on certain Saturdays, do you recall that incident? A. Yes.

* * *

[110] Q. Do you know of any other members of the church who work for TWA beside Mr. Malden? [111] A. Yes.

Q. Who are they? A. One pilot.

Q. What is his name? A. William Cordell.

Q. Does he work on what you regard as the Sabbath? A. No, sir.

Q. Do you know why or why not? A. No, I know why he does not.

Q. That is not a good question. We will forget it. Of course, pilots are covered by different bargaining contracts than you were. A. Yes.

Q. Outside of the contact that you have had with unions that you described to me and Mr. Mollenkamp,

are you familiar with how union contracts work or what seniority protection they give? A. Yes, I believe so.

Q. Have you ever discussed seniority protections with other employees at TWA? A. Not that I recall.

Q. If you know, would it be fair to say that some union members regard their seniority rights in the contract almost as preciously as you regard your religious beliefs? A. Yes.

[112] Q. And if you were allowed to bump out of seniority either to transfer shifts or to bid on a job under the contract you were not entitled to, it would almost necessarily mean that an individual who did not share your religious belief would be deprived of rights he assumed he was entitled to under bargaining agreement.

Mr. Pickett: I object to the form of the question, calling for legal conclusion based on no foundation. Mr. Hardison has his interpretations of the Constitution of the United States and any collective bargaining agreement or any contract.

Q. (By Mr. Gordon) This suit is not based on the Constitution, is it?

Mr. Pickett: Right. They are protected by Title Seven.

Mr. Gordon: If this thing is based on tying on the suit of Title Seven, I would like to know.

Mr. Pickett: It is based on Title 7 and 14 amended, supersedes all collective bargaining agreements you are trying to bring up at this time.

Mr. Gordon: Read the question.

(The question was read by the reporter.)

A. If I was allowed to bump out of slot, yes.

* * *

[114] Q. Did any Union official, to your knowledge, ever object to working out a solution, if that solution

did not violate the terms of the collective bargaining agreement? A. Not that I know of.

Q. And there were some discussions made where the Union indicated that there were possible solutions that could be made outside of the literal terms of the collective bargaining agreement, for example, allowing you to find a substitute or allowing you to take a day off without pay or allowing you to leave the job early? A. The Union was willing to allow me to take a day off without pay or to leave early, but so far as a substitute, no way.

Q. By "substitute" I don't mean a switch, just a man to come in and fill your job. They object to that also? A. Yes, sir.

Mr. Mollenkamp: Did the company object to that?

A. I don't recall.

Q. Did the company object to your taking the day off without pay, for example? A. Yes, to the point that if I was required to work, I was supposed to be there.

TRANSCRIPT OF PROCEDINGS

[202] EVERETT HERBERT KUSSMANN,

called as a witness on behalf of Defendant TWA, was duly sworn and testified as follows:

Direct Examination by Mr. Mollenkamp

* * *

[204] Q. What is the work of the Stores Department at the Kansas City Overhaul Base? A. Our responsibility involves the housing, retaining and availability of all parts at the Kansas City location to be available for use there and on its system through its structure and to transport, move parts within the industrial complex, that is, the

Overhaul Base, to transport and truck parts and other supplies in the Kansas City area.

Q. Is there any obligation of the Stores Department to supply airline needs in the event of emergency? A. Yes, sir, very definitely.

Q. Would you explain what that is? A. The basic requirements on the domestic system are funneled into what we call the Stores Co-ordinator at MCI, and they are interpreted and transmitted to the stock room area and the parts are obtained, if possible, and forwarded to the point of need. If it is not possible, the need is transmitted to the shop who produces the need, or if that is not possible we obtain from other field sources or direct the need to Purchasing if that is not first possible.

Q. What are the hours of the Stores Department? A. 24 hours a day, 7 days a week, every week of the year.

Q. And why is that necessary? [205] A. Because that is the schedule that the company operates its scheduled operation.

The Court: It is true generally of every spot, is it not, Mr. Kussmann?

The Witness: Yes.

The Court: And you are speaking of KCI, this is actually the Overhaul Base where your responsibility for not only of TWA contract but also under contract with other airlines that are brought in.

The Witness: This is true.

The Court: You may continue.

Q. (By Mr. Mollenkamp) Do you know how many other airlines we have contracts with for repair, maintenance and overhaul? A. No, I couldn't tell you exactly, offhand, but it is considerable, and then we have parts interchange agreements with many airlines, both foreign and domestic.

Q. When is the first time that you became aware that Mr. Hardison was employed in the Stores Department? A. Well, generally at the time of his employment in, I think, June of 1967.

Q. Mr. Kussmann, I show you what has been marked Plaintiff's Exhibit 1 and ask you if you recognize that document. A. Yes, this was the document that I received.

Q. And is this addressed to you from Mr. Hardison? [206] A. Yes it is.

Q. And it is dated April 25, 1968. A. Yes, sir, it is.

Q. Do you recall any conversations arising out of this document? A. Yes, the general conversation was related to the fact that he had taken on some religious change in his life and that he was going to be confronted with a difference in what we consider the contractual holidays related to his religious obligations and also that there would be some obligation related to what he defined as the Sabbath.

Q. Mr. Kussmann, I show you what has been marked Plaintiff's Exhibit 15, and ask you if you recognize that. A. Yes, it is a memo form that I sent to Mr. A. W. Nelson, who was in charge of the group that he worked in, and asked for him to arrange to meet with me and with his steward as soon as possible.

The Court: Let me refresh my recollection on 15, please.

Now, I missed your testimony as to S.A.P.

The Witness: As soon as possible.

The Court: Thank you, and what is the date of that memo?

The Witness: The memo is not dated, Your Honor, [207] but it was attached to this (indicating).

The Court: Attached to the first letter where there was written evidence of his interest in religion?

The Witness: Yes sir.

The Court: All right, so 1 and 15 are tied together. You requested Mr. Nelson to meet with you and Mr. Hardison as soon as possible.

The Witness: Not from Mr. Nelson, but for Mr. Nelson to arrange for Mr. Hardison and his steward to meet with me.

The Court: All right, thank you.

Q. (By Mr. Mollenkamp) I show you what has been marked Plaintiff's Exhibit 14 and ask you if you recognize that. A. This was from Art Nelson, A. W. Nelson, to Ralph, which would be Ralph Shields, Supervisor on his shift, to see him related to the two attached pieces of paper, documents.

Q. And just for clarification, Ralph Shields is not the same person as Roger Shields. A. No.

Q. Would you tell us who Ralph Shields is? A. If I recall correctly, he was the supervisor, Chief, Progress, on that shift at that time.

Q. And who is Roger Shields? [208] A. Roger Shields is Manager of Industrial Relations works for Mr. Stone.

Q. And the date of this memo is April 29, 1968. A. Right.

Q. Now, a moment ago you were relating a conversation that took place. Who was present at that conversation? A. Well, it is a recollection, and where it asked for the steward to be present I would assume that there was a steward present, but I do not recall who he was or if he was.

Q. Who else was present? A. Mr. Hardison.

Q. Anyone else? A. Not that I recall.

Q. I show you what has been marked Plaintiff's Exhibit 16 and ask you if you recognize that document. A. Yes, this is a memo that I forwarded to Mr. Burns Prater

resulting from the meeting that I had in which I outlined that I had agreed to Steward seeking days off.

Q. Let's take these step by step. Referring to Plaintiff's Exhibit 16, which is a memo from yourself to Burns Prater, dated May 31, tell us who Burns Prater is. A. Burns Prater at that time was the Industrial Relations Representative that related as to the Stores Department.

Q. And to put these people in the right departments, did [209] Mr. Prater at that time report to Mr. Wilbur Stone? A. He reported to the Director of Industrial Relations. I believe Mr. Stone was there at that time.

Q. Is Roger Shields also in Mr. Stone's department? A. Yes, he is.

Q. And was at that time? A. Yes, he was.

Q. Now, read Item 1 on that memo, please. A. "Agreed to Steward seeking swap or days off."

Q. Can you elaborate on that? A. This says that I agreed that Steward would seek someone to exchange days off with Hardison.

Q. And you were agreeable to that as a solution, is that correct? A. That is correct.

Q. Was that ever implemented; in other words, was there ever a swap at that point in time? A. I do not recall.

Q. Well, if there was no swap, do you have any reason why there might not have been?

Mr. Gordon: I will have to object to that. It seems to me speculation based on something that isn't even in the record.

The Court: The objection will be overruled.

A. Will you restate it?

[210] (Whereupon, the pending question was read by the reporter.)

A. No, I do not.

Q. The second item, would you read that, please? A. "Agreed to odd holidays (excused T.O.)," which would be time off, "if he works the Christian holidays when requested."

Q. Can you tell me why it is that TWA is able to offer time off on specific religious holidays? I should put that in the past tense. Why was it in Mr. Hardison's case that TWA was able to offer time off to him on specific religious holidays? A. Well, in the discussion on the holidays that he was relating to, they were not the same holidays that are what we consider the contractual provided holidays, and there would be in the main a large number of the work force there, and if he would agree—and I am certain that I outlined to him that I couldn't tell him that he would work those holidays, because it would be if he were asked in keeping with his seniority, but that it would afford people who normally would want the contractual provided holidays specified off, if he would be willing to work and allow another man to enjoy those holidays.

Q. Is the same consideration true when you are talking about permitting an employee to have a weekend off for Sabbath [211] observance? A. No, it is not, because we work a minimal number of employees on a holiday—I'm sorry, on a weekend, and therefore there is not the available manpower that there is through the week, normal workdays.

The Court: I'm sorry, I didn't get that. Is your weekend lighter employment than weekday?

The Witness: Very much so, Your Honor. In the case in the Progress, Building 2, I think the record will indicate probably 40 employees total and not over 3 of them at that time were working on the weekend.

The Court: This might be in contrast with actually the flying force, because you actually might have more weekends, would you not?

The Witness: No, it would be in keeping with the area he was working with the force, the mechanical force that he was working with, that people and people like him would be supplying parts to.

The Court: And I would assume your major overhaul staff, you try to schedule to commence Monday with a full crew if you can?

The Witness: This is true.

* * *

[213] Q. (By Mr. Mollenkamp) Will you read the third item from Plaintiff's Exhibit 16? A. "He advised that you are getting him another job. Agreed you should."

Q. Will you elaborate on that statement, please? A. Yes, I also had some discussion with Burns on this. This was generated by the fact that Mr. Hardison told me that he had had some conversation with Burns Prater in which Burns had told him that he would try to find him a position in some other area of the company, which I took it to mean, and Burns also later related, something like Production Control or Work Control, or other noncontract related positions where it would be a Monday through Friday normal work situation that would not require the working of this period. We had conversations related to the fact that in these areas there were also requirements for this type of work on occasion and he had not been successful in finding another position for him.

Q. Would you read the final un-numbered sentence on Plaintiff's Exhibit 16? A. "Says belongs to the 'Worldwide Christian Church,'" and "Worldwide Christian Church" is in quotes. "Garner Ted Armstrong, Ambassador College, Pasadena, California."

Q. Is that your handwriting? A. Yes, sir.

[214] Q. Did you write that after some investigation into Mr. Hardison's religious beliefs? A. No, he had

related to me that that is what he had or was becoming involved in and through some of the conversation, why, the association, I believe, with the radio program, which I have heard on occasion, caused me to understand what he was talking about a little better and I put that down as a matter of memo, or note.

Q. Did you have any reason to be concerned about what Mr. Hardison's religious convictions were? A. No, I had no concern about his religious convictions. I had some concern about what was involved in the days off that we were talking about, and were seeking some way to find an equitable solution, and in the discussion related to the Sabbath as he was relating his obligations to it from Sundown Friday to Sundown Saturday. It was acknowledged that there was some problem possibilities in this and that the contractual responsibilities I had related to coverage for specific requirements of service could be affected. If I recall correctly, he told me he thought he could work those out in the framework of the seniority system.

Q. I show you what has been marked Plaintiff's Exhibit 17 and ask you if you recognize that. A. Yes, this is a memo from Burns Prater to myself on [215] 5-7-68, which said that he had not made any headway, since his time off and days off requirements are too difficult to handle. I understand no one would swap days off with him.

Q. Do you know what is behind that memo? A. The only thing that I know of that is behind this memo, and I don't know whether the discussion was prior to or subsequent to the memo, was the fact that he had not been able to obtain a different position for him.

Q. Do you understand the time off problem which is referred to in this memo to refer to Sabbath observances? A. Well, I don't know whether they would

restrict it to the Sabbath or whether the additional religious holidays would be involved. That I do not know.

Q. To your knowledge, between April 25 of 1968 and October 4 of 1968, was there any other correspondence or communication about Mr. Hardison's religious beliefs? A. From April until—

Q. Well, April 25, 1968 was the date of the first communication, I believe, that you received from Mr. Hardison. The next exhibit that I am going to show you, Plaintiff's Exhibit No. 2, is a letter or memo consisting of two pages, from Mr. Haridson to yourself, and dated October 4, 1968. Now, is that the next communication in order of the exhibits that I have shown, to the best of your [216] knowledge? A. I believe this is correct.

Q. Was there any time, to your knowledge, when during that period of time, between April and October, that Mr. Haridson specifically requested to have a certain Sabbath day off or religious holiday off? A. Not to my knowledge.

* * *

[218] Q. Now, in response to that October 4, 1968, letter, did you write the letter which is Plaintiff's Exhibit 3? A. Yes, I did.

Q. And what did you agree to in that letter? A. Well, I acknowledged receipt of his letter and the previous discussion relating to his religious involvement, his holidays and also the discussion we had had pertaining to his working the contract specified holidays. I also outlined to him that he would recognize that I would not always be able to comply for reasons byond my control.

Q. What did you have reference to there? A. Well, I had to have coverage and it would not be feasible where I wouldn't have adequate coverage, then I would not be able to do this.

Q. When you say coverage, what are you referring to? A. Well, if you've got a minimal shift coverage like on Saturday or Sunday and something like this was involved, then I might not be able to make it. I also asked him for a list of the holidays that would be involved.

Q. And did he furnish such a list by his letter of October 20, which is Plaintiff's Exhibit 4? [219] A. Yes, he did.

Q. Now, what is the date of the first holiday that appears on that list? A. April 3.

Q. And he furnished this to you in October of 1968, October 20, to be exact? A. Correct.

Q. So that none of these holidays actually came up prior to the discharge, which I believe was April 2 of 1969 is that correct? A. That is correct.

Q. I will show you an exhibit which has been marked Plaintiff's Exhibit 6, which is a letter from Mr. Butcher to Mr. Hardison, dated March 21, 1969, and ask if you received a copy of that. A. Yes, I did.

Q. Did you review that letter before it was sent to Mr. Hardison? A. A letter of this nature would be reviewed by me before it was sent. Yes, I did.

The Court: The question was not whether it regularly did, Mr. Kussman. Could you recall specifically whether you reviewed that particular letter?

The Witness: I reviewed this particular letter before it was sent, Your Honor.

[220] The Court: I am not suggesting you didn't, but I would like, if I could, your personal knowledge about it, which you indicated you do have.

The Witness: Yes, sir.

Q. (By Mr. Mollenkamp) Now, what were the events that precipitated this letter, briefly? A. Well, he had not come to work on two consecutive days, being Saturdays, that he had been scheduled to work, and he

had been advised that it was necessary for him to work because of coverage requirements.

Q. Would you indicate what the coverage requirements were on March 8 of 1969, and March 15 of 1969? A. Well, he was the only man on that shift and therefore he was the only person that was available in that section to service the needs of the mechanics that were working in that area.

Q. Specifically what work would that be? A. It would be the moving of parts from one working area to another. It would be the obtaining of parts, and at this time also furnishing parts from the tool room.

Q. And what would be the consequence if those parts were not moved? A. Well, there would be mechanics that wouldn't have units to work. There might be requirements for A.O.G., Aircraft on the Ground, to be supplied by the Wire Desk, [221] and that would be called for from the shop. The general progress responsibility that our people afford to the total work and obligation of the workforce would fall upon this man in that area.

Q. Now, I believe you have testified, and in fact it is stipulated, that Mr. Hardison did not in fact show on March 8, 1969, and March 15, 1969, and the 22nd. What was done to meet the requirements resulting from his absence on those days? A. Well, when we have someone that doesn't show up, we have no other alternative but to go to what we consider emergency measures and move someone from another seniority work section to cover the need that we deem to be the greatest, and this in turn causes us to give reduced service or coverage or work effort in an area where it is scheduled.

Q. Is there any other way of handling that requirement? A. Another way is overtime, which would be on a semi-emergency basis, if the individual scheduled didn't show. It would be to hold someone over from

the previous shift if they were available or to call someone in early or to call someone in on a day off, which would leave you uncovered for awhile if you didn't have anybody.

Q. Is such overtime at a premium rate of pay? A. That is correct.

[222] Q. What is that? A. If it was the first day it would be time and a half. If it was the second day it would be double time.

Q. Now, I believe that prior to March 8 you initiated a meeting with Mr. Hardison about this problem, is that correct? A. That is correct.

Q. Can you tell us what was discussed at that meeting? A. We discussed the fact that he was in a position where he was going to have to cover his shift that I knew to be that which he had outlined to be Sabbath and that he was assigned to that and that I wanted to make sure we had no misunderstanding on it.

The Court: When was this meeting?

The Witness: Oh, possibly a week before—I think it is a matter—

Mr. Pickett: I believe it is stipulated to as being March 6th, Your Honor.

The Witness: Thank you.

The Court: That would be subsequent to the Butcher letter.

The Witness: Yes.

Mr. Mollenkamp: No, Your Honor. I'm sorry, I sort of had my questions out of chronology. The Butcher letter actually came after the meeting.

* * *

[225] Q. (By Mr. Mollenkamp) When a weekend job becomes vacant in a Stores Section at Kansas City Overhaul Base, how is that vacancy normally filled? A. If it is a vacancy within the seniority, or section, now seniority grouping, it would be given to the steward to

fill it in the seniority considerations. If it is an addition to the group resulting from a bid-in, or whether it was a reduction in force, or bidding-out, it also would be referred to the Stores for aligning according to seniority exercise.

Q. Now, returning to the meeting of March 6, 1969, who was present at that meeting? A. Well, Mr. Hardison and Mr. Tinder and myself, and I don't recall whether Mr. Butcher was there or not.

Q. Did you make any suggestions as to the way in which Mr. Hardison's religious needs might be met? A. Yes, I did.

Q. What were those suggestions? A. Well, I suggested that they could be by exchanging with an employee within the section or seniority grouping or that he might be able to exercise or exchange with [226] someone in another seniority grouping.

Q. And was the company willing to abide by these suggestions? A. Yes.

The Court: Why were these suggestions not implemented?

The Witness: I do not know.

Q. Did Mr. Tinder refuse those suggestions? A. I don't recall that Mr. Tinder refused the suggestions there, or whether or not he indicated that he would go out and see. I do not recall.

Q. Would those suggestions require Union approval? A. Yes, they would, they would affect seniority.

Q. And if the Union had approved those suggestions would the swap or trade have been made? A. Yes, if they could find someone who would do this, I would have been agreeable to it and had indicated it.

Q. In that same meeting you indicated, I believe, that you were not agreeable to time off for Mr. Hardison, is that right? A. That is right.

Q. Why is that? A. Well, I can only depend, then, on the work force that is there, and if I agree to his time off and I am usurping seniority in another section that would have to cover, which would indicate that I had more weekend manpower [227] than I required, which was not true, or I would have to depend on overtime, which could not be compulsory in this case, and I might not get it.

Q. Was your refusal to give Mr. Hardison time off on Saturdays in March of 1969 motivated in any way by his religious convictions? A. Definitely not. I respected the man's religious convictions, and I do today.

Q. Are you a religious man yourself? A. I am.

Q. What is your faith? A. I belong to the Christian Church, the Disciples of Christ. I serve in my local church as an elder. I serve in the Kansas City area as Third Vice-President of the Christian Church Commission. I serve on the General Board of the Christian Church in its national work, and I serve on the Administrative Committee of the General Board, and until this year have served on the Executive Committee of the Administrative Committee, which is the group that administers the affairs of the church when the administrative committee is not in session.

Q. I show you Plaintiff's Exhibit 8 and ask you if you recognize that document. A. Yes, I have seen this document.

Q. Who is A. L. Juengling? [228] A. He was a Chief Ships Storekeeper.

Q. And whose initials are those at the bottom? A. They are Arch Juengling's, A. L. Juengling's.

The Court: Gentlemen, you will have to keep your voices up.

The Witness: I'm sorry. They are A. L. Jeungling's.

Q. (By Mr. Mollenkamp) And can you relate briefly why this memo was written? A. This memo was sent to Mr. Butcher relating that Mr. Hardison and the Progress group on twilight had left at approximately 1830, which would be 6:30 in the evening, and he had told his lead clerk, Mr. Baumgartner, that he could not work from Sundown Friday to Sundown Saturday on account of religious reasons.

Q. Was that on or about March 28 of 1969? A. Yes, it was.

The Court: I take it that that is the memorandum with supporting data on the employment record that I saw last night. March 8 and March 15 said personal reasons. March 25 said religious reasons. Do you know whether that memorandum refused to make that notation?

Mr. Mollenkamp: Well, Your Honor, my understanding, your recitation of dates is not correct. He [229] missed three days, March 8, March 15, March 22, and then this was the subsequent Friday evening, of March 28, in which he clocked out early.

The Court: In other words, this is the fourth time?

Mr. Mollenkamp: Yes, sir.

The Court: That he made his witness as far as his Sabbath, and I don't know where the underlying data is. I did notice with some interest, because there was some affidavit, either E.E.O.C. or the Board of Procedures before the Missouri Human Rights Commission, that suggested that nobody knew why he took off any of the Saturday nights, a suggestion that was a little difficult for me to understand in light of all the documentation prior to that time, and then I notice that on the third Saturday there was actually a notation that this was based on religious grounds rather than personal reasons as stated the first two times. So I get this in sequence, this is

actually between the interval after he had been given notice of discharge and the time of actual taking effect.

Mr. Mollenkamp: Yes.

Mr. Pickett: Two statements for clarification. Number one, the documents referred to came out of TWA's personnel file and, secondly, Mr. Hardison bid again after missing the 8th, the 15th, and the 22nd on to a [230] twilight shift so that he was no longer working the entire weekend. There was a third shift, so the 28th he worked from 3 until 11, so therefore he checked out at 3 until Sundown. He worked 3 until Sundown and then checked out, and that is when this notation from Juengling and also reflected in the personnel file reflects that he checked out. He had a change in attempt to avoid the conflict of religion, hopefully so that he could check out early after working half of his shift anyway, and then work out some arrangement at a later date to make up for the difference. I don't believe the Court quite got the chronology.

* * *

[231] Q. Are you familiar with the Union Relief Committee? A. Yes, I am.

Q. Will you describe to the best of your understanding the operations of the Union Relief Committee? A. There is a little difference between being familiar with it and describing its operation. There are some men who are set aside as a Relief Committee that on occasion come in and relate to problems involving our employees and particular situations that are unusual that require special consideration.

Q. Do you know whether cases similar to Mr. Hardison's situation where the employee has resorted to the Union Relief Committee? A. You mean for religious reasons?

Q. Religious reasons or otherwise, any case of hardship that you can personally recall. A. Yes, there are cases that relate to health and family [232] involvements. We have one at the present time where an employee by the name of Libby has a problem with his wife, illness, and the Relief Committee made request that certain relief be given in this area, and it was granted.

Q. Do you recall whether resort to the Union Relief Committee was discussed in your meeting of March 6, 1969? A. I do not recall it being discussed.

Q. To your knowledge did Mr. Hardison ever seek relief from the Union Relief Committee? A. I have no knowledge that he did.

Q. To your knowledge did the Union ever resort to the Union Relief Committee in behalf of Mr. Hardison? A. I have no knowledge.

The Court: Do you know whether Mr. Hardison even knew who was on the Relief Committee and how it operated?

The Witness: No, Your Honor, I do not.

Q. (By Mr. Mollenkamp) In your opinion, is this one way his request for religious needs could have been accommodated?

Mr. Gordon: I object to what his opinion is.

The Court: Is that an objection?

Mr. Gordon: Yes, sir.

The Court: Overruled. You may answer.

A. I would have no way of knowing if they would accommodate him on that kind—

[233] Q. Is that committee administered by Union personnel? A. As far as I know, they are appointed by the Union. I have no knowledge of other appointments.

Q. And there is no provision for the Union Relief Committee under our collective bargaining agreement, is that correct? A. That is right.

* * *

[234] Q. (By Mr. Mollenkamp) Mr. Kussman, to your knowledge did plaintiff ever initiate a grievance prior to his discharge on or about March 8 or March 15 or March 22? A. Not to my knowledge.

Q. Or did the Union ever initiate a grievance on his behalf on or about that time? [235] A. Not to my knowledge.

Q. To your knowledge did either the plaintiff or the Union initiate an appeal from the discharge hearing? A. Not to my knowledge.

* * *

[246] EVERETT HERBERT KUSSMANN,

having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination by Mr. Pickett

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[247] Q. But being you are supervisor, I am totally trying to get to what particular function did he have on the weekend on a reduced work force, and, if so, what was his function and to how many people did his function seem to hinge on?

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[248] A. My statement was that he was part of a work force of approximately 38 to 40 people. He was, not what he serviced, and on the weekend it was by himself.

Q. All right, sir, during the week he is part of or individually a part of how big a work force? A. Well, the Progress group that he was a part of is 38 to 40 people, if I recall the numbers at that time. It would be about that number. Now, how many mechanics he serviced, I couldn't tell you, but it would be a greatly

reduced number on the weekend over what it would be during the week.

Q. Do you have any comparison—

The Court: What was his title, Mr. Kussmann, Crib Man or—

The Witness: Well, it is sort of a nonexistent title. He is a stores clerk and breaks down into groups that have had titles added to them, which is Progress, by a letter of agreement at that time, and the progress man is the man who does the work flow.

The Court: Did I understand his function, someone would call for a part, he would go back and locate the part and bring it out and furnish it, or what function?

The Witness: He might be asked to go get a specific part from the Kit Center; he might be asked to [249] get a part from a tool kit on the weekend, when he would be the only man there.

The Court: How many people would carry the same classification or people have training to perform this particular job?

The Witness: Well, the training is really not as great as is the segregation by seniority grouping. But during the week, as he witnessed, he drove a train throughout all of this and isolated his activities basically to the one single operation. When he was there by himself on the weekend, whoever that might be, he does that, the crib operation, which during the week we would have just one man, or two, that would do basically just that, the movement between the work areas, the areas then working, which might be done by specific people during the weekend, on the weekend he is the only guy to do that, too.

The Court: Well, apart from the question of seniority, perhaps counsel wants to get--at least I would like to get to it—how many other people in the employ of TWA could perform his assigned duties.

The Witness: Well, with limited instruction, any stores personnel we've got.

The Court: I understand, but I am talking about assuming, if one can assume in this day, the [250] absence of any seniority at all, to perform the function, how many bodies would be available to perform this work.

The Witness: In the grouping and not on the specific date?

The Court: Yes, in the whole group.

The Witness: Better than 200.

The Court: 200 available other people that could perform this job, any one of whom without detriment to the company could trade his Saturday without hampering the operation of the company, this is assuming no restrictions on seniority, is that a fair statement?

The Witness: That is a fair statement.

The Court: Is this what you are getting at?

Mr. Pickett: That is correct, that is one of the points.

Q. (By Mr. Pickett) Mr. Kussmann, you said on direct that when a person didn't show, you did one of two things, you had a person stay overtime or you had a person from another type of seniority grouping fill in in his place, is that correct? A. That is correct.

Q. Was this any breach of any seniority or any Union agreement whatsoever to do that? A. To move a man from another grouping, because someone is absent, is not a breach of any agreement. On a continuing [251] basis it would be, because it would indicate a company distortion of the seniority application.

Q. You would call that an emergency, then, is that correct? A. Yes.

Q. If it was continuing, it would be a breach of the agreement, correct? A. Right.

Q. Would you call the Hardison matter somewhat of an emergency? A. No, sir, I would not.

Q. Was it unusual? A. No, sir.

Q. Did you have a lot of other religious problems about people who couldn't work from Friday Sundown to Saturday Sundown? A. No, sir.

Q. Then how is it not unusual at TWA? A. In my opinion, Mr. Hardison had continued to work for an extended period of time, and he and I had discussed the fact that if this came, he would be expected to work and I feel that we had made sufficient arrangements for his religious tenets to take care of the unusual, his holidays, and I don't think that—or I didn't think at that time, and I still don't, that in keeping with normal industrial practices in this nation, that I could require [252] someone else to work in his place out of his work assignment on a continuing basis. If he were ill and couldn't come to work, it would be something else. A guy gets sick and can't come in, then we make emergency measures. But Mr. Hardison in this case did not come in, as far as I can recollect, and I have tried to in every way I know how, did not tell us he would not be there.

Q. But you called him in on March 6, two days before he was supposed— A. Because I was concerned.

Q. And you knew his religious tenets said he couldn't be there, didn't you? A. No, I didn't know they said he could not be there.

Q. Don't you remember the letter as early as April 25, 1968, to you, followed by a great period of correspondence which said that he firmly believed that he could not work between Friday Sundown and Saturday Sundown? A. I also remember the part of the discussion where he said he thought he could take care of his needs in keeping with seniority and he had not reached that plateau.

Q. That was before the vacation of Bill Wyatt. A. Yes, sir.

Q. In fact, March 8, 1969, was the first time that any person whatsoever or any problem whatsoever between TWA and Employee Larry Hardison's religious convictions came [253] into play? A. Basically.

Q. Is that not correct? A. Basically.

Q. And two days before the time they were to come into play you had a special meeting about how to cope with the problem, is that right? A. That is right.

Q. Now what was done to cope with the problem? A. We made some suggestions that might be done to allow him to continue on.

Q. And those suggestions were the ones you previously stated? A. Yes, that is right.

Q. Was anything else done? A. Not that I am aware of.

Q. Were there any surveys made of anybody in the Stores, whatever shift it may be, to see if they wanted to replace him? A. I don't know, and I normally would not do that.

Q. Who would? A. The steward.

Q. Well, did the employer, because you were concerned enough to call a meeting two days before, because you knew there was a problem, did you make any effort [254] whatsoever to contact anybody whatsoever to replace him on that particular religious holiday, or religious Sabbath? A. No, sir, I did not.

Q. Did anybody affiliated with TWA, that you had personal knowledge of or that you have been told, make any effort whatsoever? A. I would not know, because the normal contact on that would be the Union steward, and whether he did or not, I could not witness to.

Q. Sir, did you keep a specific personal file on the Larry Hardison matter, you yourself? A. Only the thing that has been introduced here, which was as they came in, the memos were put in his file.

Q. As a matter of fact, this April 25, 1968, memorandum and those things contained in your personal file were not made available to the E.E.O.C. investigation, were they, sir?

Mr. Mollenkamp: I object to that, Your Honor, I don't know whether the E.E.O.C. made any attempt to discover Mr. Kussmann's personal file, so I don't believe any request was ever made to Mr. Kussmann.

The Court: What difference does it make whether they were or weren't? E.E.O.C. found probable cause without it. I saw a great many duplications. The great [255] vacuum in this case is any file at all on the part of the Union. The Union hasn't marked anything as far as their processing of the case of any internal concern, as far as I have been able to find, didn't write anybody; purported to set up meetings on a pretty important subject.

Q. (By Mr. Pickett) Did you tell Mr. Butcher, your subordinate, of all of the correspondence, or share with him your file, prior to his March 21 memorandum which you have produced? A. I felt certain that I did.

Q. He was fully appraised of all the circumstances surrounding the Hardison religious matter with you prior to that memorandum? A. I am confident that he was.

Q. And approved it as well as Industrial Relations? A. I did.

Q. Now, when persons who are not working on the contract holidays, or according to your agreement with Mr. Hardison—strike. You had an agreement with Mr. Hardison that he would work the contract holidays if you would let him off on his religious holidays, correct? A. Insofar as able.

Q. Would this be that therefore there would be Union people that would be replacing who wanted off on the contract [256] holiday? A. Could be.

Q. Would this have been a breach on the seniority agreement? A. No, sir.

Q. Why? A. Because in that situation we try to get volunteers to work and then we force and reverse orders of seniority.

Q. Did you try to get anybody to work whatsoever to replace Mr. Hardison on the 8th or 15th, whatsoever? A. Did I?

Q. Yes. A. No.

The Court: Wait a minute, let me see if I understood. You called for volunteers, because it would be quite likely, for example, I would assume, that you take both a Christian and a contract holiday, Christian day, if you call for volunteers—how do you do this, by the way, bulletin board?

The Witness: Through the Union steward, sir.

The Court: Do you know what they do? Is that by way of mouth or posting on the bulletin board?

The Witness: It is by solicitation, not by posting.

The Court: All right, but whatever it is, you have no difficulty getting volunteers for someone that [257] wants to trade his obligation to work December 25th for someone that would want to trade with him.

The Witness: That isn't quite the way it is.

The Court: All right, I didn't understand it and this is why I would like to know.

The Witness: All right, take Christmas, for instance. The company determines the number of people that are required to maintain its services. We then advise the Union steward that we have this number of positions that must be filled by shifts. The Union steward then contacts to see who wants to work, and then if he is not able to fill that, then the junior people on that shift are required to work that contract.

The Court: In other words, you give preference to who does not have to work from the top of the list rather than bumping from the bottom?

The Witness: Well, when you go to forcing your seniority practices, you do it in reverse order of seniority.

The Court: So you really don't have a volunteer for trade. Does the contract call for double pay on contract holidays?

The Witness: Two and a half times now. Two times at that time.

The Court: All right, so you get some [258] volunteers on that.

The Witness: Not always, sir.

The Court: Do you have any experience in providing swaps for particular days that would not affect seniority as a matter of practice, either within your present experience on management's side—I also understood you to testify that your first employment with TWA was in a capacity for the Union after you got out of the Navy, right?

The Witness: Yes, sir.

The Court: So you have been on both sides of the table.

The Witness: Yes, sir.

The Court: Sometimes feel like you are in the middle of the table?

The Witness: Most of the time, sir.

The Court: Are there any circumstances under which there are trades for particular days that disregard seniority as a matter of practice?

The Witness: In the Union ranks in my area, sir, not to my knowledge.

The Court: Let me ask you this—

The Witness: Let me clarify if I may. That is for specific days. Now, there are some arrangements that are agreed to whereby we have changed days off or shifts, [259] as I witnessed earlier.

The Court: But this would handle the whole group, I would assume.

The Witness: Well, that was by agreed-to arrangement, yes, sir.

The Court: Now let me ask you this question. You have told me that there are approximately 200 people that could do this job. Assuming that you were not hampered by seniority requirements, what is your judgment as to whether or not it would be possible to find volunteers who would have been willing to have traded Saturday off for Sunday off, for example?

The Witness: The reason I hesitate is that you are asking the question in a complex area. It isn't just like saying from here to here. There are more than one working groups, and if it were not for a Union agreement or seniority provisions or anything else, if the company had the complete versatility to move people, no, there would not be that problem.

The Court: Of course, as the number of instances that you would have to make exceptional and special provisions increase, the difficulty of working out these arrangements, it would seem to me, would obviously increase, would that be true?

The Witness: It would be my opinion it would.

[260] The Court: And this prompts my final question before I ask counsel to continue. In your experience throughout your entire employ with TWA, how many instances do you know of where religious conviction has conflicted under circumstances similar to this? In other words, have you had any Seventh-Day Adventists, have you had any Orthodox Jews, who had the same Sabbath observation? There may be additional sects that have the Sabbath.

The Supreme Court, I think, quotes the particular member, particular chapter and verse in the Bible, that

at least Seventh-Day Adventists' selection of Sundown Friday to Sundown Saturday is based upon. My knowledge of Judaic tradition, I don't know. I am familiar that this was the traditional Orthodox Jewish Sabbath.

How many times within your experience clear back in 1965, with TWA, have you known of a conflict between religious consicence and assigned work duty?

The Witness: Limiting it to the Stores operation?

The Court: Yes.

The Witness: This is the only one that I can recall.

The Court: So it is a highly exceptional circumstance?

* * *

[261] A. No, what I was trying to illustrate was the fact that you can't predict what is going to happen when a man bids, and it always calls to mind a situation we had years ago with an individual who wanted to bid a lead job in particular work area, and the inclination was to say, "There is no possibility for you to get that job." [262] But through experience I didn't tell him he couldn't get it, because there is always that remote possibility. He went ahead and bid the job and ended up with the lead job on the day shift. If you tell a man he can bid from one place to another and the norms happen, this can happen. He might go right into that slot. But the thing that is not normal, you've got a bachelor that works the graveyard shift and he gets married and he wants to work days, and at the same time he comes up on that, that closes, so you just can't predict what is going to happen. I don't think anybody can in a seniority exercise that involves an opening where people are moving into a work section and seniority is applicable to those that are already there.

Q. One further question, sir. When March 8 and March 15 and March 22 were not worked by Mr. Hardi-

son, and let's presume nobody had filled his place, what would have been the maximum amount of hardship due to his absence, or a person's absence, from that particular job on that particular day have been to TWA? A. You mean if the job were not filled at all?

Q. That is correct, sir, for one day, one shift. A. Under the circumstances, as I can reconstruct them, if we did not have an hourly man to come in to work that shift, we would have worked it with a supervisor. It [263] would have been that important.

The Court: The problem here is notice. You don't have any problem if you get notice, so that you have time to fill this?

The Witness: Yes, we can have a problem with that, Your Honor. The Union is not required to work overtime except in an emergency, and this is not construed to be an emergency, and there have been periods of time when we could not get overtime.

The Court: But to fiil the vacancy and to avoid the use of supervisory personnel, the important thing to company was that "I am not going to show up to give you enough chance to see what your situation actually may be," wouldn't that be true?

The Witness: My attempt was to illustrate to counsel that in this case, where there are a number of mechanics working that need parts moved to them and obtained for them, we would have to supply this kind of manpower from some place, and that is what we did.

The Court: I think there is somewhere in the record that there was a suggestion made to the plaintiff that he simply report in sick on these days, and he suggested that his word should be yea and his word should be nay, as stated, is that true, and he wasn't going to lie about it? Did you have any discussions with him in [264] this connection? I am not sure whether it was the March meeting or not.

The Witness: No, sir, I did not.

The Court: You may continue, Mr. Pickett.

Mr. Pickett: One moment, Your Honor. No further questions, Your Honor.

Cross-Examination by Mr. Gordon

Q. Mr. Kussmann, let me make sure that I understand what I think was the sole import of your statement to Mr. Pickett, that the company would have had to work a supervisor if there was nobody else there to perform the job, or something to that effect. A. Right.

Q. Let me ask you this question. I am trying to focus you in on that area. Could the company have operated on that day if that job was not performed? A. The work in that area would have been greatly imperiled.

The Court: In what way?

The Witness: To say that the company could not have operated would be kind of a far-reaching statement. In the way that there were mechanics working who needed parts, that is what they were there for, is to work on specific parts, on engines or whatever the work may be that is assigned that day, and that is what [265] we are there for, is a service organization, and if the parts were not obtained for them, moved to them, moved from them, we could impair service, yes.

Q. And when you talk about those employees, are you talking about the 30 to 40 employees that worked that day? A. I don't know how many employees worked that day. I regret to say that—it is a matter of record and could be obtained, if you are talking about the mechanic force, and when I say an approximation, it would be an utter guess.

Q. Talking something about the Union Relief Committee, there has been some discussion about it, to your experience has the Union Relief Committee ever made

a permanent transfer as opposed to a temporary one? A. I am not aware of a permanent transfer, only temporary.

Q. In other words—I don't mean to put words in your mouth—in other words, the Relief Committee— A. May I correct that statement?

Q. Surely. A. When we moved from KCOB to MCI, there was one permanent transfer that was made, a man who had a heart condition, in the tool room. There was another one that has continued for a period of time, that I think time itself made it permanent, because the man had the seniority to hold it in what we call the Packaging Area, incapacitated [266] people. But the normal action of the dealings that I have had with this committee has been on a temporary basis.

Q. And isn't it true that usually their authority, I suppose you would say, extends for a 90-day period? A. Generally the request is for no longer than that. If it goes longer than that, for an extension.

The Court: Mr. Kussmann, I am intrigued with this Relief Committee. My impression is that it is more or less an ad hoc committee whose recommendation must be accepted by the Union, that they do not have plenary power to come to any agreement, but simply to recommend a solution to an exceptional problem. Is my impression correct?

The Witness: It is kind of difficult, Your Honor, for me to answer it, because I am dealing with what I consider to be a group from within the Union that speaks for them, and normally their terminating or culminating action is taken care of by letter, so I accept it as being a Union agreement.

* * *

[268] Q. (By Mr. Gordon) Let me just ask a few questions directed along that line as far as your experience

is concerned. Let's assume that Mr. Hardison did go to the Relief Committee and that the Relief Committee came up with—well, let's not use Mr. Hardison, let's say an employee goes to the Relief Committee with a problem and the Relief Committee comes up with a suggested solution. Before that solution is implemented, isn't it true that it has to be approved by management? A. Yes.

Q. And isn't it true that the Relief Committee on occasion, to your personal experience, has come up with proposed solutions that have been turned down by management? A. Been turned down by me.

Q. By you personally? A. Yes.

Q. So the fact that an employee would go to the Relief Committee doesn't necessarily mean that he would get relief? A. Well, I can't answer that.

[269] Q. It wouldn't necessarily, it would depend on the circumstances, I assume. A. Well, where I am involved, it would depend on what they brought to me as the alternate solution.

Q. You would consider it. A. I certainly would.

Q. I think maybe the notion is floating around that the Relief Committee has authority to reach decisions that management regards as vested in itself, and I am just trying to inquire as to whether that is a valid assumption. Does my question make any sense? A. Yes, to answer your question specifically, the Union committee, the Relief Committee, rather, has implemented nothing in my area without my concurrence. Does that answer you specifically?

Q. I hope so. I think it does. A. Or my subordinate's concurrence.

Q. Let's go to the March 6 meeting, and I think probably we have all agreed on some facts; I'm not sure that we have agreed on all of them. At the March 6 meeting, you proposed some suggestions which Mr. Tinder

didn't agree with, regarding the change of shifts or change of departments. Is that basically what we are talking about? A. I haven't said, I don't believe, that Mr. Tinder did not agree with them.

[270] Q. That is what I am trying to clarify. A. I would look to resultant action as to whether or not he was able to obtain agreement.

Q. Pardon me? A. I would look to resultant action as to whether or not he was able to obtain agreement.

Q. Do you recall a discussion involving whether Mr. Hardison could work a 4-day week and be excused on Saturdays without pay? A. My recollection says the discussion was related to he was willing to take the day off without pay on a continuing basis.

Q. Pardon me, are you done? I didn't mean to interrupt. A. Yes.

Q. Was that discussion acceptable to Mr. Tinder? A. I could not say that it was and I cannot say that it wasn't.

Q. Was it acceptable to you? A. It was not.

Q. Why not? A. Because this would deprive me of coverage on the day that I needed a man to work.

Q. I am a little curious, too, about the presence of Mr. Tinder. I assume it is a routine matter to call in the steward who serves an employee who has got a personnel [271] matter that either you want to discuss with him or he wants to discuss with you, is that the idea? A. Basically, but not always.

Q. Whose decision was it to call in Mr. Tinder on this occasion? A. I can't really answer that question. It could have been mine.

Q. Did you know Mr. Tinder before this meeting? A. Yes, sir.

Q. What is his capacity in terms of authority? A. Well, he had been the Union steward for some period of time in the area that we are talking about.

Q. What authority does the Union steward have in this type of discussion? A. Under the contract he is a representative that relates to those people. He is appointed by the Union or elected by the people in that section, depending on whatever the circumstances may be.

Q. Do you know if his authority extends beyond routine-type matters? What I am getting at, is it a significant influence on the relationship, if it isn't true that the company will either go to the local Grievance Committee or to the district for that matter. A. I don't understand your question.

Q. In your experience in relating to Union stewards, what [272] is your experience as to the scope of their authority to make changes that have an impact on the collective bargaining relationship? A. If they feel like they get beyond their authority or something that doesn't relate to them, they normally go to the committee.

Q. Would taking someone out of seniority and giving him a priority or giving him super seniority be this type of matter, if you know? A. If I were a steward it would be that type of matter.

Q. You used to be on the Grievance Committee, as a matter of fact. A. Yes, sir.

Q. I hope I can make myself clear. Is it true to say that all the employees who could have—all the employees within Mr. Tinder's—I'm sorry—that all the employees within Mr. Hardison's seniority grouping had rejected the weekend off by virtue of their previous bids? A. Are you asking me if they had?

Q. Yes. A. I cannot answer that question.

Q. Well, wouldn't the selection of seniority within that grouping indicate that those senior employees didn't want to work on weekends? A. It would indicate it, but your initial question would [273] cause me to have

to know whether everybody had been contacted, and I don't know this.

* * *

[275] Q. Fine, but if the Union disagreed with one of your proposed actions, you could go ahead and take it anyway and the Union would have to take steps to complain about it. A. Yes, sir.

Q. They don't have veto power. A. No.

The Court: You've never found any hesitancy of the Union complaining under that circumstance, have you?

The Witness: Yes, complaining, yes; but as far as taking the action, if I felt as a part of management, under the contract, I had the right to take the action and the Union must abide by it unless I jeopardize their safety or health and then grieve it.

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[282] WILBUR STONE,

called as a witness on behalf of Defendant TWA, was duly sworn and testified as follows:

Direct Examination by Mr. Mollenkamp

* * *

[285] Q. In TWA's operation is the Kansas City Overhaul Base the location for all base overhaul operations systemwide? A. Yes.

Q. Would you describe what a base overhaul is? A. Well, a base overhaul, after an airline has flown a given number of hours, as approved by the Federal Aviations Agency, it then must be brought in for complete undressing, if you will, taking apart, inspections completely, and completely overhauled and rebuild anything that is either worn excessively or shows any signs of wear or corrosion or anything of that sort. These airplanes

come in usually of an evening on a weekend so that the small crew there in the hangar can get them ready for the larger crews coming in then on the main part of the week.

Q. So is it fair to say that the maintenance facility here is not just another line maintenance, but it is the most major facility that TWA has? A. It is the only overhaul base and the main major repair station.

Q. How often are the operations at the overhaul base conducted? A. Well, I guess you would best answer that as continuously. There are 7 days a week, 3 shifts every day, 365 days a [286] year.

Q. Why is that necessary? A. Because you have to repair and receive items from the field that may have been removed because of airplanes that are presenting some problem with some piece of equipment or something—the time control on some of the items is up and they have to be brought in and they have to be repaired and you have to get them turned around in the shops and back out to the field, because if they are not out to a foreign location someplace, either as standby or repair on an airplane, it may be necessary even to get one off the ground, and a flight could be delayed or passengers cancelled off a flight or something of that sort, because the equipment isn't available.

Q. When you say the equipment isn't available— A. I mean the airplane. Wouldn't be ready to go, is a better way of saying it.

Q. Does the Kansas City Overhaul Base include the Stores Department? A. Yes.

Q. What is the work of the Stores Department at the overhaul base? A. Well, I would describe it as the department that receives shipments coming in. It receives materials coming in on [287] our own airplanes from out in the field, including units for rehire, units

that may be damaged, units that are worn or time controlled or something, bending of parts and so on, in the general stock rooms and transportation of parts and pieces between shops and between buildings.

Q. And is that operation also conducted on a 7-day-a-week basis? A. Yes, sir.

Q. 365 days? A. 365 days a year.

Q. 3 shifts per day? A. Right.

* * *

[293] The Court: If Mr. Stone was in charge of the examination that was made at that time, and he made that examination, or if it was made under his supervision, I would be very happy to hear it.

Mr. Mollenkamp: I will put that question to the witness.

Q. (By Mr. Mollenkamp) You are familiar with the details of the Hardison case, isn't that correct? A. Yes.

Q. What hardship, if any, would have resulted from attempting to accommodate Mr. Hardison's request for Sabbath— A. Well, the first hardship you run into is the absence of a person who is necessary to perform essential function. If you take other action to correct that, then you have robbed from someplace else where you have already had to adjust your work force to put everybody you can on to the regular work week with Saturdays and Sundays off in keeping with the request and interest of most of the [294] people, so that you have so few people, then, to call upon and so little interest to call upon under an agreement such as we have, that you just can't get there without additional overtime or robbing something someplace.

Q. You said that was the first problem. Are there others? A. Well, the second problem you would run into would be that if you did something under our agreement, if you did something to violate the basic agreement

or the basic understanding, then you would run into troubles with the people who are complaining, and as a matter of fact that would be true whether you had an agreement or not.

The Court: Mr. Stone, I want to be sure that I understand your answers. I gather from your answers that you are assuming that any arrangement and any accommodation that might be made to take care of the highly exceptional situation presented by Mr. Hardison's case; Mr. Kussmann, who has been with TWA since 1945, both sides of the table, says to his knowledge this is the only case like it that he has ever heard of.

So we are talking about one single accommodation. But my question to you is whether your answers do not assume that any accommodation that may be made must be made within the framework of observation of the [295] seniority provisions in your contract.

The Witness: Yes, to a degree, that is true.

The Court: Well, isn't it to a total degree that it is true?

The Witness: Well, I don't think so.

The Court: Well, I want to know why you don't think so.

The Witness: The reason I don't think so is that when you have as high as 4400 people in one place or 2500 people, roughly, represented by a Union, or another 1500 people who are non-management people, clerical and others working in an organization, there has to be some kind of a systematic or organized or accepted way that people appreciate how these kinds of things have to be done, and to move in against something that is understood and appreciated and sometimes demanded, to require them to do something different does present problems, and so then you end up with a lot more complaints, a lot more dissatisfied people, than you had before.

The Court: Well, as I understand that, that still is predicated upon the difficulties that would be implicit in doing anything except following the procedures that are provided in the contract as to transfers, hours, days, shifts, in accordance with the seniority requirements.

[296] A. Well, that would be true unless you would have developed some other kind of a system to take care of it. I suppose you could go alphabetically or go by age or color of hair.

The Court: That is exactly right, and the question in this case—you have been here throughout the case—is whether or not the Congress of the United States said to management and Union, "You've got to develop some supplemental system to take care of these cases." That is the question in this case.

I don't decide the question, but I am required to find whether or not there is hardship within the meaning of the law, and I have difficulty understanding how one can claim hardship if he leaves out whether some additional system for handling these exceptional cases has been devised and attempted.

Now, I can understand completely that circumstances may be present where you have a single employee who is of critical importance and very highly specialized expertise where it would be exceedingly difficult to make any kind of an arrangement, but in light of Mr. Kussmann's testimony, I can't conceive that you have this type of individual when there are at least 200 people located in Kansas City that if they were willing, and if not barred by seniority, could not be put in that [297] slot and perhaps, as he indicated, you might have any number of people quite willing to do so, to create a Sunday for a Saturday, because Sunday is generally more a family day, if the wife is working—if she is in a store she may be working Saturday, and married couples could be together on Sunday, but of course all this is speculation until somebody systematically made some inquiry as to what sort of reaction and how big a problem you really had to cover the 200 additional people who are qualified to do this job on any day.

Now, do you disagree with his estimate of 200 other people that could have filled this job?

The Witness: In terms of the basic qualifications of what they would do when they were on the job, I don't disagree. I have no basis for disagreement. He would know that better than I.

The Court: It is not a unique job.

The Witness: No, but I think there are other factors involved beyond just the qualifications of the individual, because once you establish by any device, whether it is alphabetically or whatnot, to try to get people—as you say, Sunday is the family day off, you try to give people Saturday and Sunday off, then trading Sunday for Saturday doesn't solve your problem, you've got to go back further into that and interfere with more [298] people than just the person who might have already Saturdays and Sundays off and could switch the two, and out in the field stations you can frequently come up Mondays, Tuesdays, Wednesdays, Thursdays, Fridays, Saturdays, and a combination of days off, whereas, at the overhaul base we mostly have Saturdays and Sundays off.

* * *

[304] Q. (By Mr. Mollenkamp) In your capacity as Director of Industrial Relations, Kansas City Overhaul Base, do you have responsibility for the administration and enforcement of the collective bargaining agreement? A. Yes.

Q. Do you feel that uniform application of the seniority principles among all TWA employees covered by that contract is important? A. Yes.

Q. Why? A. Well, for the reasons I have indicated a moment ago, you have to have some kind of a way of solving problems with vacations and days off and things of that sort, and an accepted and preferred method is in effect to allow the person who has been around working with you for a longer period of time to have the first choice on those things.

Q. And is that the reason for Article VI of that collective bargaining agreement? [305] A. I suppose so, yes.

Q. And that is the seniority provision, is that correct? A. Yes.

Q. Is it TWA's policy to make every possible effort to arrange work schedules to allow Saturday and Sunday off as regularly scheduled days off at the overhaul base? A. Yes.

Q. Why is that not possible in all cases? A. Well, it is because of necessity to keep things moving and get things in and get things out of the overhaul base on Saturdays and Sundays in order to meet the flight schedule of the airlines, some of which can be effective even a day or so later.

The Court: What is TWA's policy, Mr. Stone, as to recognition of conscientious religious scruples against working on Saturday?

The Witness: Well, in any instance that I have known about where people had problems of that kind, except this instance, they have been able to adjust them by actually observing the day that they preferred.

The Court: Well, what is TWA's policy under those circumstances where they cannot be adjusted under seniority?

The Witness: Beg pardon?

The Court: I say, what is your policy if they [306] can't be adjusted by reason of the application of the seniority provisions in your Union contract?

The Witness: Well, we would try wherever we could to make adjustments, allow the person to accommodate himself.

The Court: Suppose that is impossible, what would be your policy then?

The Witness: If it were impossible, our policy would be we would have to terminate the person because he couldn't meet his work schedule.

* * *

[344] Q. (By Mr. Mollenkamp) Mr. Stone, what would happen if TWA posted a bulletin board notice advising all employees that they may request days off for religious belief? [345] A. I think we would have a considerable number of people who would want to make changes that we couldn't accommodate and continue to operate.

Q. Would that impose a hardship on TWA's operation? A. Yes, it would.

Q. In what way? A. Well, in two or three ways. One, you would not be able to meet the schedules that would require many of the people—or at least would be in response to a request of many of the people to have Sunday off, and we have to have operations which would be an additional application. The other thing would be in the administrative area trying to find out and schedule arranged to move people around if that were necessary to do so.

Q. I believe in his testimony yesterday Mr. Kussmann stated that there were approximately 200 stores clerks who had the basic qualifications to do the same work that Mr. Hardison did, is that correct? A. He did, yes.

Q. Now, were those 200 employees scheduled to work, to the best of your knowledge, on March 8, March 15, or March 22, which were all Saturdays? A. No, they would not all be scheduled on those days.

Q. In other words, we don't have 200 stores clerks scheduled to work on Saturday. [346] A. No.

Q. In fact, what is the number to the best of your knowledge? A. Oh, I think in that section on that shift there were only about four, and in the middle of the week there are probably 15 or 20 in the regular work week, so the relationship is something like that, as I recall.

Q. You are talking about— A. In the Progress group. That is my recollection.

Q. On Mr. Hardison's specific shift within the Progress section of Stores in Building 2, and of those four on the shift on Saturdays, would each of those four be assigned to different jobs as Mr. Kussmann I believe described? A. Well, I don't know—I guess I must have misunderstood the question. I don't think there were four people in his classification working on Saturday. There were four people on his shift, of which only one was working Saturday and Sunday, as I recall. Now, what was the other question that relates to that?

Q. I am trying to clarify that and that is my understanding. A. Okay.

Q. Now, in addition to the basic qualification of stores clerks, what other factors are involved in assigning these individuals to work? A. Well, in the stores function at that time there were about 10 sections, departments, that had been called at various [347] times and are now called seniority groupings. They were referred to that way yesterday by Mr. Kussmann, or in the questioning, at any rate. Those break themselves down into somebody at the warehouse, somebody in the stock room in Building 1, somebody in the stock room in Building 2, some of them in Progress Building 1, and some in Progress in Building 2, and then there are enough more to make up 10 out of that total group. I think maybe the Kansas City Municipal Airport was another group, and I don't

just remember what the other one was right now. And in the division into those various functions you assign or request enough people to work that operation on all shifts 7 days a week as required. Then that number of people has to be broken down into the regular work week by shift and enough of the carry-over on that weekend to provide coverage for weekends and whenever those functions are necessary to be operated.

Q. What is TWA's policy in respect to accommodating employee requests for religious observances? A. Well, the basic policy would be, we would try to accommodate that request by transfer or swap, and where the Union is involved, with their consideration and to the degree that that could be accommodated, and beyond the transfer or swap, really, is a better term, the next thing we would do would be to try to accommodate if we [348] could without interfering with the work that the person is expected to do, allowing the time off or in some instances people are allowed to make up the work that they take the time off.

Q. And it is only after you attempt those things that you reach the ultimate problem that faced Mr. Hardison, namely, a discharge, is that correct? A. Yes.

The Court: May I make an inquiry as to this case? It is my clear understanding that nobody made any effort whatever to find out whether any one of the potential 200 people wanted to swap so they wouldn't have to work Saturday, as far as Mr. Hardison is concerned. Is that impression correct?

The Witness: I can't answer what your impression is, Your Honor.

The Court: Well, let me ask you if you have any knowledge that anybody made any effort whatever to find out whether any one of the 200 people would rather work—would like to swap with Mr. Hardison?

The Witness: I wouldn't have that knowledge.

The Court: Well, do you have any knowledge that any effort was made?

The Witness: No, sir, I would not be privy to that information.

[349] The Court: You would know about it, wouldn't you?

The Witness: I would know if something happened, yes.

The Court: Well, you would know because you have helped prepare the defense of this case, isn't that true?

The Witness: Yes, to a degree.

Q. (By Mr. Mollenkamp) Isn't it true, Mr. Stone, that if efforts were made to query the 200 employees about their willingness or unwillingness to work on that day, that those efforts would be made by the Union steward and not by the company? A. Yes.

The Court: Well, that is assuming that seniority agreement is absolutely sacrosanct and must be followed under these circumstances.

Q. (By Mr. Mollenkamp) Well, do you have any knowledge of what the Union steward did in inquiring of those 200 employees about willingness or unwillingness to work Saturday? A. I have no knowledge of that.

The Court: I think it is undisputed that they didn't do anything, isn't that true, Mr. Gordon?

Mr. Gordon: I think that is true. If there is [350] any dispute, it is over whether they can do it on their own or whether they are required to do it on a directive by management.

The Court: All right.

Q. (By Mr. Mollenkamp) Do you have any knowledge that there was any intention on the part of TWA to discriminate against Mr. Hardison because of his religious convictions?

Mr. Pickett: I object, Your Honor. This gentleman—

The Court: Oh, objection overruled, overruled, overruled. Of course he didn't. That is your testimony. Let's get on to the next question.

A. That is my question.

Q. Your answer? A. Yes—repeat the question.

The Court: You did intend to fire him, didn't you?

The Witness: Yes, when that time came, yes.

The Court: All right, let's get going.

Q. (By Mr. Mollenkamp) Well, is it your testimony that there was no intention to discriminate against Mr. Hardison in the discharge on account of his religious convictions? Is that your testimony? A. That is true.

* * *

[352] *Cross-Examination by Mr. Pickett*

* * *

[358] Q. And that is the only hardship, isn't that true, that TWA might have had by accommodating Mr. Hardison, having somebody else working in his place or somehow not allowing him to work on the Sabbath?

* * *

A. No, that is not the only hardship TWA might have had. The one hardship in trying to accommodate Mr. Hardison, by TWA, by itself, without the action of the Union, could have resulted in grievances by people whose seniority would have been affected if we had taken some kind of [359] bilateral action.

Q. Were there any other hardships to TWA's business that you as an individual would know of that would have occurred if any accommodations or efforts were made for Mr. Hardison's religion on those days in question, other than what you just mentioned? A. Yes, I think so.

Q. And what are those? A. Would you repeat your question again?

The Court: What counsel is doing is having you state all the hardships that in your judgment as head of Industrial Relations, TWA could suffer.

Isn't that what you are getting at?

Mr. Pickett: That is correct.

The Court: Why don't we start out again.

Q. (By Mr. Pickett) You have told me one hardship, Mr. Stone. The last one you told me, that there would be a problem with the Union because of grievances from other people—

Mr. Gordon: I object to that as a misstatement of what he said. He said there would be a problem with other people—

The Court: Objection will be overruled.

Q. Outside of the problems that might occur with the Union persons, what other hardship or problems, when conducting [360] its business, would Trans World Airlines have had by accommodating or making an effort for Mr. Hardison to observe his Sabbath in their business? A. Well, the business would reflect other places—I mean the effects of that action could reflect other places on outside activities besides just what the mechanics were doing at the overhaul base.

Q. So that— A. So that if parts were necessary for operation in the field or if parts were due out in the field and they weren't progressed in that department so they could be finished up or picked up in the shop, or gotten back for shipment out to the field, there might be a delay on a flight the next day, someplace else, a whole planeload of passengers might be discommoded as a result of that.

Q. There were three shifts on Mr. Hardison's day, is that not correct, there were 24 hours a day, three shifts a day? A. I assume so. I don't know about that in particular.

Q. Mr. Hardison only covered one shift over an 8-hour day, isn't that correct, sir? A. That is right.

Q. So are you saying to this Court that TWA's business in the conducting of its airplanes facilities would be totally disrupted and put into a state of chaos by this individual not working an 8-hour shift in taking parts and [361] picking up parts from mechanics working on, I assume no more than one airplane at a time? A. I am saying it could be.

Q. Are you saying that it is? A. I am saying that it is disrupted when parts cannot be processed and moved as they should be. Frequently there are things that are very essential, and if those aren't moved then it is a real hardship. Flights have been delayed as the result.

Q. But—

The Court: Well, let me find out. Isn't your answer to that question based upon an unstated implicit assumption that you would be unable to even fill Mr. Hardison's spot—

Mr. Pickett: That is my next question, Your Honor.

The Court: —and it is absolutely essential that he has to work from Sundown Friday to Sundown Saturday?

The Witness: That is only partially true, Your Honor, because if no one works the job he is obligated to work—

The Court: I understand your answer to the question about the chaos and the disruption of the entire TWA system is that if Mr. Hardison doesn't work on his [362] Sabbath, you would be totally unable to have anybody else work his shift. Isn't that true?

The Witness: Well, I am saying that if it were impossible to get anybody else to work for his shift.

The Court: That is exactly what I am saying. You are saying that it is impossible to fill it up?

The Witness: It is impossible—it was impossible without robbing from somebody else.

Q. (By Mr. Pickett) But in truth and fact, didn't his supervisor fill those spots or didn't you take somebody else from another job so the function was fulfilled on those days, sir? A. In fact he would have pulled somebody from another function that he was supposed to perform.

Q. My question was, as a matter of fact, wasn't that what was done and somebody did fulfill that function? A. I am sure somebody did fulfill that function, but some other function suffered as a result.

Q. Is Mr. Hardison qualified and a possessor of such a degree of expertise that his presence on that particular time from Friday Sundown to Saturday Sundown would completely disrupt the airlines activities? A. I don't think it is a matter of expertise. It is a matter of being available to do the things that have to be done at that time.

[363] Q. But you didn't try and get a substitute for him out of the number of other employees that might have had the same qualifications, did you, sir? A. I think Mr. Kussmann did.

Mr. Pickett: No further questions. Thank you, sir.

The Court: Do you have any questions, Mr. Gordon?

Cross-Examination by Mr. Gordon

* * *

[364] Q. The last step being arbitration before a system board of adjustment. [365] A. Well, the system board of adjustment is in effect kind of an arbitration process, grievance machinery.

Q. Out of, I believe you said a hundred or so that come out of MCI— A. A hundred to two hundred, let's say.

Q. A hundred or two hundred that come out of MCI, do you have any notion of how many of those involve seniority? A. Well, there would be a lot that would involve seniority, because seniority is involved in the problem of assigning people to other departments, people being assigned to other departments when a more senior person feels he may have had that, he gets involved in the specialty classifications and so on. There would be quite a number.

Q. Would it be fair to say from your point of view as a management official that the employees represented by the Union involved in this case take seniority as a very serious and important contractual right? A. Yes, it would.

Q. Do you have any opinion on what the effect on the employees' morale or attitude toward the company, and for that matter, toward the Union, would be if the provisions in the contract were not followed?

Mr. Pickett: I object, Your Honor. He is not a member of the Union.

[366] The Court: Mr. Pickett; I believe he is about to run down, because how this question can have any possible basis for a judgment of opinion of this man as to the morale of hundreds upon thousands of employees under circumstances that never has been attempted is beyond this Court's comprehension. I don't know how this man is in a position, or any other man is in a position, to express an opinion that means anything without some factual base upon which to do it.

Mr. Gordon: Well, I tried to establish—

The Court: Furthermore, the question is totally outside the scope of examination by either other counsel. Now let's finish up whatever other questions you want to ask and get this witness off the stand.

Mr. Gordon: This is my last question. Is the objection sustained, sir?

The Court: Anybody else have any additional questions?

Mr. Gordon: I didn't understand if the objection was sustained.

The Court: I was hopeful you were about to run down, and I still entertain that hope, although I am beginning to doubt it. How much longer do you have?

Mr. Gordon: I would like an answer to that question that was objected to. I didn't understand the [367] Court's ruling.

The Court: Don't you know what the answer is? The answer is that in his judgment it would have a terrible effect upon the morale.

Isn't that right, Mr. Stone?

The Witness: That is right.

The Court: What basis do you put that on?

The Witness: I put that on the basis that even people who are not in the contract are also highly concerned about some standard system of having things apply to them and their choice of shifts where they do have to have their shifts in this organization—

The Court: But you don't have any experience to base that on, do you?

The Witness: Yes, sir.

The Court: You do?

The Witness: Yes, sir.

The Court: When have you had a reaction among the employees of TWA because you made somebody shift a job because of religious grounds?

The Witness: I thought the question was about seniority, sir.

* * *

[377] EARL BOX,

called as a witness on behalf of the Defendant Union, was duly sworn and testified as follows:

Direct Examination by Mr. Gordon

* * *

[379] Q. When was the first time that you heard of Mr. Hardison and his problems? A. I don't know as I could say the exact date. It was somewhere along about the 1st of March, though, I think.

Q. Do you recall if it was before or after the first Saturday that Mr. Hardison didn't work? A. I believe it was just before.

Q. What happened on that occasion? A. Well, Steward Tinder contacted the Grievance Committee and related the problem that might develop and asked for advice.

Q. Where was this conversation? A. In the Grievance Committee office.

Q. Who was present? A. I was, George Barnes and Jay Fisher.

The Court: Was the plaintiff there?

The Witness: Not at that time, no.

The Court: Thank you.

Q. (By Mr. Gordon) What was said at this meeting about Mr. Hardison that you can recall?

Mr. Pickett: I object on the ground that any statement by third parties is hearsay.

The Court: Why doesn't this call for hearsay?

Mr. Gordon: Well, first of all, it is submitted [380] to show later motivation, and second—

The Court: Is it an exception to the hearsay rule that to prove motivation hearsay is admissible?

Mr. Gordon: My understanding is that hearsay is defined as an out-of-court statement asserted—used to prove the truth of the matter—

The Court: Let's assume for the moment that motivation is relevant. On what do you base the notion that motivation has something to do with this case?

Mr. Gordon: I think one important factor is why the Union took the action it took.

The Court: I understand, but I am asking you what legal authority do you have that says the motivation of the Union is a relevant factor in the determination of the issues presented in this case?

Mr. Gordon: Well, at the very minimum there is either—part of the Act—I believe it is part of the Act that limits liability where the liability is based on non-purposeful discrimination. That is the very minimum.

The Court: What section of the Act are you making reference to?

Mr. Gordon: I can't give you that.

Mr. Mollenkamp: It is 2000(e)(5)(g).

The Court: Well, we will get into that. I [381] am going to even let hearsay in. It is obvious that you cannot base any finding of fact upon any testimony that Mr. Box may give as to what other people may have said to him. He can testify as to what he said. Mr. Box's participation in this, I think, is reasonably well apparent as to what he thought (a) of whether or not the plaintiff was conscientiously devoted to his religious scruples; and, second, whether or not this was a case which in Mr. Box's written language, as appraised April 5, 1969, which was a Saturday, said—

You were the author of the letter that said, "This is a sad case in which we find an individual torn between a loyalty to his job and loyalty to his religious beliefs"?

The Witness: Yes.

The Court: You are the author of that?

The Witness: Yes.

The Court: Have you changed your mind about it?

The Witness: No.

The Court: You may continue your examination.

Q. (By Mr. Gordon) Can you tell me what happened at this meeting, with special reference on what you said concerning Mr. Hardison? A. Well, Mr. Tinder outlined what he thought was the facts of the case of what might happen, and collectively the [382] three committee members tried to explore every avenue that might get us out of this problem.

Q. Go ahead. I didn't mean to interrupt. A. Unfortunately, everything that we could think of doing involved some prior action by the company, and so at that time we decided to merely wait and see what happened.

Q. Did you specifically discuss changing shifts or changing departments or working without pay, that type of thing? A. We discussed all of those, also discussed proposals of working six days a week to get the one day off.

Q. Was there a second meeting after this—well, excuse me. Let's go back. How long would you estimate that meeting lasted? A. About 45 minutes.

Q. Was there a second meeting concerning Mr. Hardison? A. Yes, after the—he missed the first Saturday, which I believe was March 8. Mr. Tinder came back and said we now really had the problem. We again explored all the possibilities and could come up with nothing that—any action that we could take or initiate or that we thought we could initiate.

Q. Mr. Hardison was not present at the second meeting, either, is that correct? A. No.

* * *

[385] Mr. Pickett: And the fourth, sir?

The Witness: The fourth was to plead leniency and possibly keep him on the job and possibly win the whole thing at a higher step.

Mr. Pickett: Thank you.

Q. (By Mr. Gordon) Did Mr. Hardison have a reaction to these four alternatives that you have outlined? A. His initial reaction was to just tell the company flatly that they couldn't discharge him; however, we discussed that possibility and explored it and told him that in our opinion this was a sure way of getting a discharge settlement out of it, and that once you got off the job it was much harder to get you back than it was if we could keep you on the job until the case was settled.

The Court: Mr. Box, at this meeting of your committee when you were discussing the alternatives, had you consulted counsel in regard to what other alternatives may be available or was this simply based upon your past experience as a member of the Grievance Committee?

The Witness: It was based upon past experience, and then the files on past discharge cases.

The Court: Was the matter submitted to counsel for the Union?

The Witness: No.

* * *

[386] Q. Is there a rule that the Union recognizes concerning discharges that involve insubordination and that also [387] involve orders given by the company that the employee disagrees with? A. Well, we have arbitrators, as you well know, that have set down a rule that we are stuck with, I guess, that any time the company gives you an order, then it is up to you to follow that order and file a grievance if you disagree with it.

Q. And that is a recognized rule. A. Right.

Q. That at least the Union thinks it is stuck with, or at least exists out at the plant. A. Right.

Q. I'm sorry, but I don't remember if you concluded on my original question which was to the effect of what the result of this discussion with Mr. Hardison was concerning the four alternatives. A. Well, at that time he indicated that we probably knew better, knew more about discharge cases than he did, and told us to use our own judgment on how to present them.

Q. And what was your judgment about how to present them? A. Our judgment was plead for leniency and perhaps get a complete reversal at higher level.

Q. Was this decision based in any way on Mr. Hardison's religion? A. No.

* * *

[389] The Court: Mr. Box, let me ask you this question. What is your judgment of what the committee would have done and what you as chairman of the committee would have recommended had you been advised that the order to report on March 8 may have been in violation of a law of the United States? Would you have recommended the course that you followed or would you have recommended and followed a course described by you as a head-on attack?

The Witness: I would have personally recommended the same course that we followed.

The Court: Even if the company's orders were in violation of the 1964 Civil Rights Act.

The Witness: Yes, sir.

The Court: Why would you have done that?

The Witness: Because, as I previously stated, once a man is discharged and off the job it is much harder to get a reversal out of the company. If you can keep him on the job and there is no monetary loss involved, the company is more likely to reverse their field.

The Court: Well, didn't you know in these [390] circumstances that under no circumstance was there anything except discharge that was indicated unless you could convince the company that some sort of a suspension or a letter in his file or something of that sort, some other sanction, would have been imposed? You didn't have a shred of doubt in your mind that he simply was never going to work on Saturday, did you?

The Witness: I always assumed that the member told the truth unless I had some reason to believe otherwise. However—

The Court: Well, the reason I say that is that on April 7 you stated that Mr. Hardison indicated, and I am quoting from your letter, which is an exhibit here, that under no circumstances could he violate his religious beliefs even to save his job. Is that what you believed at the time?

The Witness: This is what he said and I have no reason to disbelieve him.

The Court: So that it was immediately apparent in light of his seniority situation that about the only thing the company had to do would be to fire him, because his seniority situation was such that he was going to draw this Saturday shift, as he did draw it, March 8, March 15 and the following Saturday work. I can understand your general policy that you are better off and [391] have a leeway for negotiation while someone is still on the job, but I am wondering in this particular circumstance where it would seem to me to be almost inevitable that discharge was clearly indicated, why is it you would not have elected to have met the issue head-on, particularly if you had been advised that the company's assigned reason of insubordination may have been in violation of the 1964 Civil Rights Act?

The Witness: Was that a question, sir?

The Court: Not a very good one.

Mr. Gordon: If I might, I might be able to clear that up a little.

Q. (By Mr. Gordon) Did Mr. Hardison have a change in shift assignments between the third Saturday that he missed and the discharge hearing? A. Yes.

The Court: Did that have any effect at all concerning what we have been talking about?

The Witness: It had a tremendous effect on the committee because we thought we had the solution. Up to that time, the information that we had was that he couldn't work Saturdays, period. And when we heard that he went to twilight we thought we had the case won, actually, because this then would allow him to work the full week. However, as I think has been already in the [392] record, I believe it was the 28th of March he quit work at Sundown, which blew our case back up again.

Mr. Gordon: Have I covered that sufficiently?

The Court: Yes, I think so.

Q. (By Mr. Gordon) During this meeting, any of these meetings prior to the discharge hearing itself—I would like to make sure that we have covered all the meetings, prior to the discharge hearing itself. At those meetings did you tell him about the procedure that the contract called for in terms of what his alternatives were if he would lose his discharge hearing? A. We covered all the steps of the grievance procedure at both meetings, and also the civil suit was discussed at both meetings.

Q. Did you discuss District 142? A. It was discussed that this would be the next step that would handle the next step of the grievance procedure, yes.

The Court: Well, you indicated to him very clearly, did you not, that you were not going to take the head-on approach under any circumstances?

The Witness: No, sir.

The Court: Well, what did you mean when you wrote Mr. Bowman, when you said, "We patiently explained the situation to Mr. Hardison. He insisted on a hearing [393] and all we could do was plead that discharge was too severe." What do you mean by that language? I would take it from that that you had ruled out the head-on approach for the reason that you stated and you patiently explained to him what your position was going to be, which was not a head-on approach but simply a plea for leniency because in your judgment if he were actually fired it would be a more difficult case to get straightened out. Now, that is my understanding of your testimony. Do I misunderstand you?

The Witness: I believe so.

The Court: Well, you tell me about it, because I want it straight.

The Witness: As I stated at both meetings, we outlined what we thought was the possibility. We asked him if he had any other approaches to go, you know, possibilities, and then we asked him if he wanted to select the approach. At both meetings he said, "Use your best judgment."

The Court: Well, do you think this was a selection on his part?

The Witness: Obviously he thought that we knew more about it than he did.

The Court: I understand that, but the question is, did you think you were doing what he wanted done?

* * *

[395] Q. (By Mr. Gordon) One question, then. Those are notes, [396] I take it, that you took at the discharge hearing? A. The second page is notes that was taken at the discharge hearing. The first page is a brief, short brief, made up off of our notes reflecting the case that we processed to the district.

Q. Both of those pages went with your subsequent letter, I believe, April 7, that was sent to Joe Bowman? A. Yes, sir.

Q. Do you recall how long the discharge hearing lasted on March 31? A. I would say 45 minutes, about 45 minutes.

Q. Do you recall if Mr. Hardison said anything about the hearing? A. No, sir. The Hearing Officer, as usual, at the end of the presentation of the company, or the Union, asked if anybody had anything additional to add, and nobody said anything additional.

Q. Would it be fair to say that Mr. Hardison had a chance to say something if he wished to at the discharge hearing? A. Yes, sir, before he went into the hearing I told him to sit right beside me and any errors that was made, so that he could correct the errors, you know, he could tell me what it was and I could correct it. And at the end, he had an opportunity to say whatever he wished to say.

[397] Q. Did you talk with Mr. Hardison as you left the hearing? A. Yes, sir, we walked back over to the committee office and he walked with us and we discussed the case, and he was wondering what the decision was going to do.

Q. Well, can you tell us what the substance of that was rather than just—the broad outlines? A. Of the discussion, you mean?

Q. What was the discussion as you left the discharge hearing? A. Well, the discussion, he wanted to know what we thought the Hearing Officer—what his decision would be, and we told him in our opinion, that it was going to be discharge. He at that time wanted to know again, wanted to cover the subsequent steps, and we went through those again with him.

Q. Did you talk to Mr. Hardison after that time? Well, let's stop there. You say "we", I take it you mean the other two grievance committeemen. A. The other two grievance committeemen and Mr. Hardison and I.

Q. No company people present?

The Court: Any mention of the 1964 Civil Rights Act at this hearing, Mr. Box?

The Witness: None.

The Court: Thank you.

Q. (By Mr. Gordon) Did you see Mr. Hardison after that time? [398] A. He came to the Grievance Committee office roughly a day or two after the decision came down and he received a copy of it.

Q. Who else was there? A. The other two Grievance Committee members and then there was various people coming in and out. This was not a closed meeting.

Q. But the people coming in and out weren't concerned with Mr. Hardison's problem, they were just in and out of the office, is that a short way of saying it? A. Yes.

Q. How long did the meeting last with Mr. Hardison? A. About 30 minutes.

Q. What was said in the meeting? A. Well, he was wishing to explore the possibility of resigning from the company and keeping his record clear. He was worried about what the future steps in the Grievance procedure would be if he didn't resign. We explained the steps to him one more time, told him that we was in the process of making the file up to forward it on to the district, told him that in our opinion the company would not accept a resignation at this time, and clear the record.

Q. Is that the last conversation you had with Mr. Hardison? A. To the best of my knowledge it is the last time.

[399] Q. Do you ever recall meeting him in a hallway and having him ask you a question and you saying "No," or "No way," and turning around and walking off? A. No, sir.

Q. Did you have any conversations with Mr. Bowman about Mr. Hardison? A. I had numerous conversations with Mr. Bowman, yes.

Q. When was the first? A. As far as the time, I don't believe that I could put a time on it. He normally came up to the overhaul base, at least two or three times a week, and I think we asked him every time he came up, beginning immediately after we submitted the case to him.

Q. Were any of these discussions before your—let's call it your transmittal letter of April 7? A. I can't remember.

Q. All right. Do you recall what the discussion was with Mr. Bowman concerning Mr. Hardison? A. Well, we was naturally interested in the case. We asked Mr. Bowman every time if he had a meeting set up with Hardison to discuss the case, you know.

The Court: Mr. Box, in your conversations with Mr. Bowman do you know whether he consulted counsel in regard to this case? Did he indicate that he had talked to the Union's lawyer about it at all?

* * *

[404] Q. (By Mr. Gordon) I believe my last question was to discuss [405] or describe the conversations that you had with Mr. Bowman concerning Mr. Hardison. A. As I previously stated, every time, or practically every time, he came up we would ask what progress had been made and he reported to us that he had made many attempts to get hold of Mr. Hardison, in fact, had set up two meetings with Mr. Hardison; however, he could never get with Mr. Hardison to discuss the case. Finally—

Mr. Pickett: Your Honor, I just note that my objection as to hearsay was a continuing objection.

The Court: That is right, it will be noted and overruled.

I assume Mr. Bowman is going to testify, is he not?

Mr. Gordon: Yes, sir.

A. Finally he stated that he had to assume, since he couldn't contact Mr. Hardison, that he was no longer interested in the case.

Q. Are you familiar with any other employees who had not complied with the grievance procedure, as you understand it, and have their grievances subsequently dropped either by the district or the local? A. I don't understand the question.

Q. Were there any other employees, to your knowledge, other than Mr. Hardison, who hadn't complied with the grievance [406] procedures who had their grievances dropped? A. Yes, sir.

Mr. Gordon: I have no further questions.

The Court: You may cross-examine, Mr. Pickett. Do you need a recess?

Mr. Pickett: No, I think I can do it.

Cross-Examination by Mr. Pickett

* * *

[415] Q. Now, you also said in your affidavit to E.E.O.C. that Mr. Hardison showed you a case in Iowa saying that an [416] employer couldn't do this, right? A. He showed us a newspaper clipping. What the extent was, what law it was filed under, I do not know.

Q. Well, did you follow it up? A. There was not even any date on the clipping, as I recall. I don't know what newspaper it came out of. How do you follow it up?

Q. Did it ever refer to the fact that a private employer could not fire somebody for his religion? A. It dealt with a case from—I believe it was the Seventh Day Adventist, I believe, and I don't even recall what court it was in. It might be a city court for all I know. I don't really know.

Q. But you had that knowledge just after the discharge hearing, did you not? A. Have the knowledge before the discharge hearing, sir?

Q. You didn't raise that at the discharge hearing, did you? A. I am not a lawyer, sir. I wouldn't know how to argue it.

Q. But after you got that knowledge you didn't ask a lawyer, either, did you? A. No, sir.

Q. Did you pass that knowledge on to Mr. Bowman? A. Mr. Hardison was going to pass the knowledge on to him, from what he said.

* * *

[418] *Cross-Examination by Mr. Mollenkamp*

* * *

[419] Q. Could you elaborate on that discussion, please? A. Well, as far as the shift involved, I don't really remember what shift was involved. I just remember that we discussed Mr. Hardison bidding out of Progress to some other seniority grouping or bidding off of the day shift in Progress to another shift.

The Court: Mr. Box, I am under the impression that all of the alternatives considered in this regard were strictly within the framework of seniority law as contained in the contract in the various alternatives that might be available consistent with seniority by groups and by ranking within a group, is that correct?

The Witness: Yes.

The Court: And that you did not explore, indeed, because you did not feel any necessity to explore, any alternative that would be outside of the seniority requirements of the contract, am I correct under that impression?

The Witness: We explored all possibilities that would not discriminate against another employee.

The Court: That is right, and that everybody's seniority rights would be respected in the alternatives that you did explore.

* * *

[423] Q. Was there ever any discussion between you and Mr. Tinder about the Union Relief Committee? A. Not to my knowledge, no.

Q. What is the Union Relief Committee? A. It is an unofficial committee who, if the company has a problem or the Union has a problem, the company gets together with this committee and the company takes some action and possibly the committee will recommend to the Union that this is something that we should overlook for a temporary period of time.

Q. Do you feel that the Union Relief Committee could have worked out Mr. Hardison's problem? A. As I understood Mr. Hardison, he had a permanent problem, not a temporary problem.

* * *

[443] JOSEPH WHITNEY BOWMAN,

called as a witness on behalf of the Defendant Union, was duly sworn and testified as follows:

Direct Examination by Mr. Gordon

* * *

Q. On the International? [444] A. No, sir.

Q. You presently hold a position for Local 1650? A. Job Steward in the Aircraft Department.

Q. Isn't it true that you are presently plaintiff in an action filed in this court against both Local 1650 and District 142? A. Yes.

Q. You were assistant business chairman—assistant—A. General chairman.

Q. Of District 142 at the time of this Hardison matter, is that correct? A. Yes, sir.

Q. And you received a transmittal letter from Mr. Box together with some notes, I believe, is that correct? A. Yes, sir.

Q. Now, following the receipt of that letter, did you make any attempts to contact Mr. Hardison? A. Yes, I did.

Q. What were these? A. I tried to contact him by telephone, I tried to contact him by visits to his home, I contacted his father-in-law who I knew at Trans World Airlines, and asked if he would get this boy to come down and see me and let's see if we can get this problem resolved.

* * *

[446] The Witness: Yes, sir.

The Court: Now, let us assume that the telephone messages that you may have left at his home or the word that you sent through the father-in-law—

The Witness: I also made visits to his home.

The Court: But you didn't catch him either time.

The Witness: Neither time, and I left a note in his door.

The Court: Now, suppose he came to talk with you, did you have any different advice to him than that which you stated to Mr. Box, namely, that "After review of this case it is my opinion the Union cannot help this brother."

The Witness: The only review I had before me was what Mr. Box had sent me and I could get no further information from Mr. Hardison because he wasn't available.

The Court: How much additional information did you feel that you needed? What did you want to ask him? Now, to refresh your recollection—

The Witness: I certainly hate to go in any kind of a meeting without a little knowledge of what it's all about from the so to speak horse's mouth.

* * *

[450] The Witness: I did not, no, I did not.

The Court: You may continue.

Q. (By Mr. Gordon) Would the Union Relief Committee be something that the local would have dealt with or something that you would have dealt with as Assistant General Chairman? A. I don't think the Relief Committee has any authority anyhow, not under the contract—they just try to help solve some unwanted problems that they inherit.

Mr. Mollenkamp: I move that the answer be stricken as not responsive to the question.

A. All right, sir.

The Court: Do you have additional questions?

Mr. Gordon: Did you overrule—did you want to rule his objection?

The Court: I am going to overrule it, because I am overruling everybody's objections.

Mr. Gordon: All right.

Q. (By Mr. Gordon) Joe, was there a time set under the collective bargaining agreement in which you must file your appeal from a discharge? A. Yes, 10 days.

[451] The Court: Now that is in evidence and I'm going to start sustaining some objections. The factual data to make that argument is apparent in this case by reason of the contract provision, which this Court, as I have advised counsel, is intimately familiar with. That is how I know it is in there. Now, ask another question that isn't already established.

Q. (By Mr. Gordon) Joe, have you dismissed discharge cases before because employees have failed to cooperate with your processing of the case? A. Yes.

Q. Was the fact that you took in writing the letter to Mr. Box, I think May 2, motivated in any part by Mr. Hardison's religion? A. No.

Mr. Pickett: Object, Your Honor, calls for a conclusion.

The Court: Objection is overruled.

Mr. Gordon: I have no further questions.

The Court: You may cross-examine, Mr. Pickett.

[452] *Cross-Examination by Mr. Pickett*

Q. You received the letter on April 7 from Mr. Box, correct? At least it was dated that and you received it thereafter? You knew Mr. See, the father-in-law, rather intimately, or at least you knew him. A. I knew he worked for TWA. Yes, I know Mr. See.

Q. Then did you also know his wife had left him seven days after his discharge or about the 9th of April, 1969? A. I had heard, yes, and that is one of the reasons I made the second trip to his house, to see—well, maybe Mr. See didn't notify Mr. Hardison, and I personally wanted to go out and see, but no answer to the door.

The Court: Do you remember what you said on the note, Mr. Bowman? That is a long time ago.

The Witness: Yes, I told him something about it is imperative that I talk to you if I process this case beyond this point, and stuck it in his door with my name and card, you know, just a business card, on the back of a business card. It was gone on the second trip that I made out there, also.

The Court: Fine, thank you.

Q. (By Mr. Pickett) Did you make a carbon of this note? A. No.

Q. Did you set up any file whatsoever on this grievance? [453] A. Yes.

Q. Did it contain anything other than the two letters which are in evidence here today? A. No.

Q. Did you in fact find out from Mr. Cy See whether or not the plaintiff was still living there after his wife had moved everything out? A. No, I didn't.

Q. Did you try and find out where he was living? A. I didn't go to the post office to find out, no.

Q. Did you try and find out where he was living? A. I tried. I didn't find the man.

Q. How did you try? You said you tried to find out where he was living. How did you try? A. I asked different people if they knew where I could get hold of Mr. Hardison, how I could contact him, and sit down and talk with him.

The Court: I would assume you could have gotten his address off the employment record.

The Witness: I had his address. I went to his house.

The Court: And this is where it was, but you cannot testify that he was still living there.

* * *

[457] Q. (By Mr. Pickett) Sir, did Mr. See have any conversation with you about setting up any appointments for you to see Mr. Hardison? A. Yes, I told him to definitely send him to my office.

Q. On what date? A. I don't recall right now.

Q. Was this written correspondence to Mr. See at all? A. No, sir.

Q. Okay. A. I met him in the hall at the overhaul base. I made special trips up there to see Mr. See, when I couldn't locate the young man.

Q. Are those the only efforts you made, that which you just stated to the Court today? Were there any other efforts on your part? A. No, sir.

* * *

MEMORANDUM AND ORDER

(Filed May 15, 1974)

This is an action by an individual plaintiff against his former employer, Trans World Airlines (TWA) and three labor organizations, International Association of Machinists and Aero Space Workers (The International), International Association of Machinists and Aero Space Workers, District 142 (District 142), and International Association of Machinists and Aero Space Workers, Local 1650 (Local 1650), seeking redress from alleged religious discrimination in violation of the Civil Rights Act of 1964. Plaintiff asserts that his discharge from employment because of his refusal to work from sundown Friday to sundown Saturday pursuant to the tenets of his religion was a violation of his religious liberty, contrary to 42 United States Code, §2000e-2. Plaintiff is a member of the Worldwide Church of God.

The jurisdiction of this Court is based upon 42 United States Code §2000e-5(f). Defendant TWA is an employer engaged in interstate commerce and subject to Title VII of the Civil Rights Act of 1964, 42 United States Code §2000e. Defendant unions are labor organizations likewise subject to the provisions of Title VII.

I.

Defendants first argue that this Court does not have jurisdiction in this case because of the alleged failure of the plaintiff to comply with the filing deadline of 42 U.S.C. §2000e-5(d). That argument is answered by the decision of our controlling court in *Richard* v. *McDonnell Douglas Corporation*, 469 F. 2d 1249 (8th Cir. 1972), which held that the 210-day statute of limitations is tolled upon receipt

of the complainant's complaint by the E.E.O.C. Accordingly, in this case plaintiff's complaint of August 29, 1969, tolled the 210-day statute of limitations so that even if we assume that the E.E.O.C. assumed jurisdiction of plaintiff's case on November 18, 1969, the latest arguable date, plaintiff perfected his federal remedy well within the proper time. We find and conclude, therefore, that we do have jurisdiction of this case under the provisions of 42 U.S.C. §2000e-5(d).

The defendant International challenges this Court's jurisdiction over it on the ground that there was no proper service of process on that organization. The alleged service was made by serving a copy of the complaint on James Tarwater, the financial secretary of Local 1650, who had no official capacity with the International.

We find and conclude that Local 1650 and The International are not autonomous and that, therefore, service upon the local constitutes valid service of process on The International. See *Deboles* v. *Trans World Airlines, Inc.*, 350 F. Supp. 1274 (E.D. Pa. 1972) and *Claycraft Co.* v. *United Mine Workers of America*, 204 F. 2d 600 (6th Cir. 1953).

We further find and conclude that because Local 1650, District 142, and The International are not autonomous, the interests of the latter two organizations were adequately represented before the E.E.O.C. by Local 1650. The argument, therefore, of defendants, District 142 and The International, that they could not be sued in federal court because they were not named in the complaint before the E.E.O.C. is without merit. See *Moody* v. *Albermarle Paper Co.*, 271 F. Supp. 27 (E.D. N.C. 1967).

Defendants argue also that plaintiff failed to exhaust his administrative remedies, first, because he did not pursue administrative remedies set out in the Railway Labor

Act (45 U.S.C. §153, et seq.) and, second, because he did not otherwise pursue contract grievance procedures. The first argument is answered by *Norman* v. *Missouri Pacific Railroad*, 414 F. 2d 73 (8th Cir. 1969), which reversed the district court's dismissal of a complaint filed pursuant to Title VII of the Civil Rights Act of 1964. The Court of Appeals held that the complaint was cognizable under the Civil Rights Act absent specific prohibitions in the Railway Labor Act and that the Railway Labor Act did not foreclose efforts of employees to secure their statutory rights under the Civil Rights Act. No specific prohibition in the Railway Labor Act has been cited by defendants.

The second argument is answered by the recent decision of the Supreme Court in *Alexander* v. *Gardner-Denver Co.*, ... U.S. ....., 42 L.W. 4214 (February 19, 1974), which held that an employee is not foreclosed from suing in federal court under Title VII of the Civil Rights Act of 1964 after arbitration proceedings resulted in an unfavorable ruling. The Court concluded that no election of remedies principles inhered in Title VII. Submission of a claim to one forum does not preclude a later submission to another, Justice Powell declared in the majority opinion. It follows, therefore, that plaintiff can choose to proceed under Title VII without resorting to grievance procedures at all.

II.

The relevant factual circumstances of this case are not substantially disputed. Many of the facts stipulated by the parties in Standard Pretrial Order No. 2 are simply not relevant. Other findings suggested by the parties in which there is dispute are for the most part irrelevant. The facts as we have found them include only those rele-

vant to the resolution of the legal questions presented and for the most part are those which admit of very little dispute. The following discussion will serve as our findings of fact and conclusions of law pursuant to Rule 52 (a), Federal Rules of Civil Procedure.

A. *Union Responsibility*

Plaintiff names the three union defendants in his complaint and asks for an injunction against the unions to prevent them from failing to adequately represent the plaintiff and from depriving plaintiff of his right to freely exercise his religious beliefs without discrimination by the Union. In his suggested conclusions of law, plaintiff states merely that defendant unions "discriminated against plaintiff by reason of his religion in violation of the Civil Rights Act of 1964 by enforcing a collective bargaining agreement which was discriminatory against plaintiff in its application." Plaintiff cites a number of cases in support of this proposition without discussion. We have studied all of those cases. Most are entirely irrelevant to the issue of whether the union should be held responsible for the violation, if any, of the Civil Rights Act of 1964. Others are relevant only by broad application of the principles stated therein.

Labor union compliance with the Civil Rights Act of 1964 is dictated by 42 U.S.C. §2000e-(2)(c):

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Although it is nowhere stated directly by plaintiff, it appears that he is complaining that the union discriminated against him because of its failure to refuse to comply with the seniority provisions of the collective bargaining agreement between TWA and The International, which governed plaintiff's employment. A violation of those provisions would have been required in order to adjust his schedule with one of the other workers on his shift so that he would be able to observe his Sabbath.

Plaintiff, in arguing that the Unions discriminated against him by "enforcing a collective bargaining agreement which was discriminatory against plaintiff in its application," is arguing that the Union acted wrongly by standing by the contract and refusing actively to support plaintiff's efforts to avoid the seniority provisions of the contract. This actually amounts to an assertion that the Union has a rather stringent duty to accommodate.

The duty to accommodate, which we shall discuss in more detail later in this opinion, at the time the alleged

discrimination in this case took place, was required by E.E.O.C. guideline 29 C.F.R. §1605.1:

> (b) The Commission believes that the duty not to discriminate on religious grounds, required by Section 703(a) (1) of the Civil Rights Act of 1964, includes an obligation *on the part of the employer* to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. [Emphasis supplied]

The Unions interpret this language to mean that the duty is imposed only on the employer. They argue that that limitation was intentional because, they contend, a union has no power to accommodate. The Union only has power to control its own organization, make collective bargaining agreements with the employer, and enforce those agreements. The employer, the Unions conclude, is the only one who is in a position to accommodate.

We disagree. The language of the regulation does speak in terms of the employer but so have other provisions and regulations pursuant to the Act, which have been interpreted to include the union. For example, 42 U.S.C. §2000e-2(h), the provision on seniority systems discussed below, has been applied to unions. See, e.g., *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969).

Furthermore, this case is a perfect example of a situation which a union could accommodate a member if required to do so. TWA agreed that plaintiff could change shifts if the union approved. Such approval would mean that the union would have to suspend the operation of the seniority rules in plaintiff's case. Had the union made

this accommodation, plaintiff would have been able to observe his Sabbath as he wished. The question, however, is whether Title VII imposed upon the unions the duty to ignore their contract under the circumstances of this particular case.

We do not believe that Title VII goes that far. We find and conclude that to require the union to ignore seniority in every case in which an employee with lesser seniority can observe his Sabbath only by changing shifts with a more senior employee would work an undue hardship on the union.

In an article written after *Dewey* v. *Reynolds Metals Co.*, 429 F. 2d 324 (6th Cir. 1970), Professor Harry T. Edwards and Mr. Joel H. Kaplan expressed concern that the E.E.O.C. regulation imposing the duty to accommodate place an intolerable burden on the employer. They described the burden of proving the absence of undue hardship as "nearly impossible to demonstrate if the work force is large enough." Edwards and Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 Mich. L. Rev. 599, 628 (1971). They rightly argue that such an interpretation "imposes a priority of the religious over the secular" in that it might require an employer to favor employees whose religious beliefs require them to follow different schedules than the regular over other employees, even to the point of violating the other employees' bargained for rights. The same considerations apply in the case of the unions.

The labor-management contract to which the union is a party clearly sets out the seniority rules which are binding on the company and the union (Article VI (b), Pl. Ex. 30). The contract, of course, can not operate in violation of the laws of the United States but we do not believe that Title VII requires that the seniority provi-

sions be ignored. Professor Edwards and Mr. Kaplan discuss this problem at length:

> Assume that an employer operates a seven-day-a-week operation, that he has entered into a collective bargaining contract with the union, and that the contract provides for shift preference by seniority. What if a low-seniority employee, who works a shift that includes Saturday and Sunday, converts to a religion that requires him not to work on one of those days? Must the employer then transfer this employee out of a Sunday or Saturday shift even though numerous employees with greater seniority are required to work over the weekend? Under the E.E.O.C. guidelines, the transfer of one employee could hardly be said to create an "undue hardship" for the employer, but what of the other employees? What of the hardship imposed on the employee who waited a long time to acquire sufficient seniority in order to avoid weekend work and is now forced back into it because of someone else's religious beliefs? Are the religious beliefs of one individual so weighty that they supersede the lack of religious beliefs of another? [69 Mich.L.Rev. at 628].

Professor Edwards and Mr. Kaplan argue that the E.E.O.C. guidelines are confusing and could not be construed to require the employer in every case to shift an employee out of seniority to accommodate religious beliefs. We do not believe that the E.E.O.C. guidelines require such a result. The hardship on employees should certainly be considered as hardship on the conduct of business, for the management of employees is one of the chief concerns of a large business and, in the case of a labor union, is the chief concern. A hypertechnical application of the words "undue hardship of the employer's business" by

ignoring this fact, would, as Professor Edwards and Mr. Kaplan argue, impose 'a priority of the religious over the secular" [69 Mich. L. Rev. at 628] and would perhaps raise constitutional questions.[1] See *Dewey* v. *Reynolds Metals Co.*, 429 F. 2d 324, 334-335 (6th Cir. 1970). We find and conclude, therefore, that it would have been an undue hardship for the unions to have changed plaintiff's shift in violation of the seniority provisions of the labor management contract.

Finally, with reference to the seniority provisions, we find and conclude that 42 U.S.C. §2000e-2(h), if not absolutely controlling, at least indicates that Congress did not intend that unions or employers be required to take actions that could impinge upon bona fide seniority systems. That Section reads as follows:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. [42 U.S.C. §2000e-2(h)].

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1. Professor Edwards and Mr. Kaplan direct attention to Judge Learned Hand's decision in *Otten* v. *Baltimore & Ohio R.R.*, 205 F. 2d 58, 61 (2d Cir. 1953), in which he stated:

> The First Amendment protects one against action by the government . . . but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. . . . He must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world.

A significant judicial gloss has been placed on this language by courts processing racial discrimination cases. Consequently, a seniority system can not be "bona fide" if it perpetuates the consequences of past discrimination. In other words, a seniority system is not lawful if it freezes Negroes into past patterns of discrimination. See *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971); *Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC* v. *United States*, 416 F. 2d 980 (5th Cir. 1969); and *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968).

Plaintiff does not urge, nor, do we think, may he urge, that the seniority system in this case locked in any discrimination against individuals of plaintiff's or anyone else's religion. The seniority system was not designed with the intention to discriminate against religion nor did it act to lock members of any religion into a pattern wherein their freedom to exercise their religion was limited. It was coincidental that in plaintiff's case the seniority system acted to compound his problems in exercising his religion. He did not have sufficient seniority in the building to which he transferred to be able to impose his choice of days off over those of the other employees who had more seniority.

The duty to accommodate under the circumstances of this case, therefore, did not require the union to ignore its seniority system. It did, however, require that the union fairly represent the plaintiff when it became aware of the fact that plaintiff was facing difficulty in scheduling for his Sabbath and that he was in danger of disciplinary action by the company. See *Maclin* v. *Spector Freight Systems, Inc.*, 478 F. 2d 979, 988 (D.C. Cir. 1973), and *United States* v. *Bethlehem Steel Corp.*, 312 F. Supp. 977, 988 (W.D. N.Y. 1970), rev. on other grounds, 446 F. 2d

652 (2nd Cir. 1971). A union always has an affirmative duty to protect its members from unlawful discrimination in its area of authority, i.e., negotiating a nondiscriminatory contract, *Robinson* v. *Lorillard Co., supra*; or processing grievances of discrimination, *United States* v. *Bethlehem Steel Corp., supra.*

In this case, since the collective bargaining agreement was essentially non-discriminatory, it can only be argued by plaintiff that the unions failed to properly process his grievance. We do not believe that the facts sustain such a charge.

The union first learned about plaintiff's problem at a meeting that Hardison had with Everett Kussmann, Manager, Stores Systems, on September 6, 1968, and at which James Tinder, Local 1650 steward, was present. At that meeting, plaintiff's requirements for time off on religious holidays were discussed and Kussmann agreed that the steward should seek to swap days off, to excuse time off on specific religious holidays if plaintiff agreed to work on regular holidays, and to attempt to find plaintiff another job (Pl. Ex. 16). There was no evidence that Tinder took any active part in that meeting. After the meeting plaintiff, on October 9, 1968, wrote Kussmann stating his satisfaction in the arrangements discussed and advising Kussmann that he had transferred to the 11 to 7 shift, which did allow him to observe his Sabbath (Pl. Ex. 2).

On December 2, 1968, plaintiff voluntarily transferred from Building 1, where he had sufficient seniority to bid on a shift which would allow him to observe his Sabbath, to Building 2, where he was second from the bottom in seniority.

Kussmann arranged for a meeting to be held on March 6, 1969 to discuss ways to avoid any difficulty that might

arise because of plaintiff's new schedule. The Local 1650 steward, Mr. Tinder, was present at that meeting. Apparently several possibilities for meeting plaintiff's requirements were proposed: (1) changing plaintiff's shift; (2) changing plaintiff's job; and (3) allowing plaintiff to work four days a week. Tinder was amenable to working out plaintiff's problem on any of the above bases, subject, however, to the seniority provisions of the contract. On that date there were no jobs open for bid nor did plaintiff have sufficient seniority to bid on any other job (Tr. 168). The seniority provisions, therefore, precluded the possibility of plaintiff's changing his shift (Tr. 82-85, 154-155, 157-169, 193, 225-227). They also prevented plaintiff from changing his job (Tr. 167-168). The company was unwilling to permit plaintiff to work only four days a week (Tr. 270).

Plaintiff, therefore, was not satisfied with the results of this meeting. He did not, however, file a grievance with the grievance committee as he knew he had a right to do (Tr. 169).

Plaintiff was absent from work on March 8, March 15, and March 22, 1969. On March 21, plaintiff met with A. J. Butcher, Supervisor, Stores Planning and Control, and James Tinder. As a result of that meeting Butcher wrote plaintiff on the same day advising him that a discharge hearing would have to be scheduled (P. Ex. 6).

Before the discharge hearing, the grievance committee met with plaintiff for approximately an hour and discussed the possible approaches to resolving the problem. Finally, the grievance committee decided that the best approach would be for plaintiff to remain on the job, pleading for leniency at the discharge hearing, and if that hearing resulted in discharge, to attempt to obtain a reversal of that decision at a higher level (Tr. 385). The possibility

of the union waiving his seniority provisions so that plaintiff could get on a different shift was apparently not discussed (Tr. 389-391). Plaintiff told the committee to use its own judgment in presenting the grievance (Tr. 387).

After the meeting, but before the discharge hearing, plaintiff changed his shift to the twilight shift, which permitted him to have Saturdays off. The testimony was that the union believed at this time that its problems were solved (Tr. 391). But on March 28, 1969, plaintiff quit work at sundown and it became immediately apparent that the union would not be able to argue that plaintiff should not be dismissed because his conflicts had been resolved (Tr. 391-392).

Immediately prior to the discharge hearing on March 31, 1969, the union held another meeting with plaintiff and reviewed the various approaches to the problem and the procedures for appealing to District 142 if the company decided to discharge plaintiff (Tr. 392-393). Plaintiff was told that he should sit next to Earl Box, Chairman of the Grievance Committee, so he could object to any errors made by the Committee.

At the hearing, the union argued against discharge on the grounds that procedural errors had been made and that discharge was too severe a penalty for the infractions with which plaintiff was charged (Joint Stip. 31).

Immediately after the discharge hearing Box again explained the appeals procedure to plaintiff (Tr. 397). On April 12, 1969, a letter was sent to plaintiff explaining that he had been found guilty of insubordination and was, therefore, discharged. Several days later plaintiff again met with the Grievance Committee and asked about the possibilities of his resigning to keep his record clean. He was told that the company would probably not accept

his resignation and was again told of appeal procedures and that the Local would forward the case to the District (Tr. 398).

Joseph Whitney Bowers, General Chairman of District 142, attempted several times but was unable to contact plaintiff (Tr. 446, 452). He finally arranged two different meetings with plaintiff, through plaintiff's father-in-law, Cyrus See (Tr. 444, 457). Plaintiff failed to make either one of them and Bowers, pursuant to standard procedures, dropped the case (Tr. 405-406).

In light of our findings of fact with regard to the union's actions in processing plaintiff's case, we find and conclude that the unions did not violate their duty to plaintiff under Title VII of the Civil Rights Act of 1964.

The duty of fair representation requires that the union act in good faith and without malice. See *Vaca* v. *Sipes*, 386 U.S. 171 (1967). We do not find that Local 1650's representation of the plaintiff in his dispute with TWA was arbitrary, discriminatory, or in bad faith. Any failure on the part of District 142 to pursue the matter after discharge was due entirely to plaintiff's lack of cooperation, which made it impossible to proceed with an appeal. The problem never reached The International. We find and conclude, therefore, that judgment should be entered in favor of the three union defendants.

B. *TWA Responsibility*

Defendant TWA makes several arguments against plaintiff's contention that it violated Title VII of the Civil Rights Act of 1964 when it discharged him:

[1] A statutory requirement to accommodate religious needs of employees would violate the Establishment Clause of the First Amendment.

[2] Title VII of the Civil Rights Act of 1964 does not require employers to affirmatively accommodate employees' religious needs.

[3] TWA made reasonable accommodations to plaintiff's religious beliefs up to the point where further steps would have caused undue hardship.

[4] Plaintiff voluntarily placed himself in a position which he knew or should have known would diminish his chances for Sabbath observance.

[5] TWA did not "intentionally" discriminate against plaintiff on account of his religious beliefs. [Def. TWA Brief, pp. 35-36].

The first question that must be resolved is indicated by #2 above and that is what kind of duty to avoid religious discrimination did Title VII of the Civil Rights Act of 1964 impose upon TWA. At the time of the acts complained of, 42 U.S.C. 2000e-2(a)(1) provided, in part, as follows:

> (a) It shall be an unlawful employment practice for an employer:
>
> (1) To fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

The statute did not provide for any duty on the part of an employer to accommodate the religious needs of employees.

The E.E.O.C. regulation which set out the guidelines on religious discrimination, however, provided as follows:

> (b) The Commission believes that the duty not to discriminate on religious grounds, required by Section 703(a) (1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. . . . [29 C.F.R. §1605.1(b)].

The question, therefore, becomes whether the E.E.O.C. regulation is a proper interpretation of the Act before it was amended to specifically include a duty to accommodate. TWA cites *Dewey* v. *Reynolds Metals Co.*, 429 F. 2d 324 (6th Cir. 1970), aff'd per curiam by an equally divided court, 402 U.S. 649 (1971), in support of its position that the Act did not impose a duty to accommodate. In *Dewey*, an employee alleged he had been wrongfully discharged from his employment because of his religious beliefs. The Court of Appeals held that the trial court had erred in applying the regulation, which was not in effect until July 10, 1967, to the activity of the employee, which took place in 1966. The Court in *Riley* v. *Bendix Corp.*, 464 F. 2d 1113, 1117 (5th Cir. 1972) expressed the view that *Dewey* offers no guidance to the question of whether the regulation was a valid one because it was not in effect when the acts complained of took place. We agree.

We note further, however, that in *Dewey* the employer offered the plaintiff, as well as all other employees, the option of either working on Sunday or finding a replacement. The plaintiff did find replacements for five Sundays and then refused to find others, claiming that this practice was a sin. The Court of Appeals held that even if the 1967 regulation were applied, the employer made

a reasonable accommodation by offering the replacement system.

Finally, *Dewey* was based in large part on the final award of a grievance arbitrator under the labor management contract, which has nothing to do with the question at issue here.

In *Riley* v. *Bendix Corp., supra,* the Court held flatly that the regulation was valid. It relied in part upon the amendment of the Act, which was approved by the Congress on March 8, 1972. Far from holding that that amendment indicates that the legislative intent of the old Act was not to include a duty to accommodate, as TWA argues we should conclude, the Court in *Riley* held the amendment validated and recognized the regulation as a proper interpretation of the old Act.

The amendment to 42 U.S.C. §2000e-(j) is as follows:

> The term "religion" includes all aspects of religious observance and practice, as well as belief unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

The union's brief refers us to Eighth Circuit cases which state broad principles of statutory interpretation to the effect that amendments to statutes passed for the purpose of correcting a judicial interpretation should be applied prospectively only when Congress intended to change the former law as interpreted by the courts. That principle is obviously correct but defendants ignore the legislative history of the amendment at issue in this case.

The legislative history, reported at 118 Congressional Record, §§227-253, includes this statement by Senator Randolph of West Virginia, who sponsored the amendment:

> I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State or local governments. Unfortunately, the courts have, in a sense, come down on both sides of the issue. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on this question.
>
> This amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved. [118 Congressional Record at §228]

The measure was passed in the Senate by unanimous vote.

The Chairman of the House Committee made this statement about the amendment:

> The purpose of this subsection is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in *Dewey* v. *Reynolds Metals Company*, 429 F. 2d 325 [324] (6th Cir. 1970). Affirmed by an equally divided court, 402 U.S. 689 [91 S. Ct. 2186, 29 L.Ed. 2d 267] (1971). [118 Congressional Record, pp. 1861-1862]

The measure was also passed in the House by unanimous vote.

We find and conclude that the legislative history of the amendment of the Act, together with the fact that

weight should be given to the administrative interpretation of the Act, as reflected by the regulation (see *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433 (1971)) indicate that regulation 29 C.F.R. §1605.1(b) was facially valid and is controlling in this case.

We find TWA's argument that the duty to accommodate an employee's religious beliefs is a violation of the Establishment Clause of the First Amendment to be without merit. Defendant TWA correctly states the test for determination of whether a governmental action violates the Establishment Clause as it was set out in *Committee for Public Education and Religious Liberty* v. *Nyquist, et al.*, 413 U.S. 757, 772-773 (1973); (1) that the law must reflect a clearly secular legislative purpose; (2) that the law must have a primary effect that neither advances nor inhibits religion; and (3) that the law must avoid excessive government entanglement with religion. Defendant, however, has not given the Court much guidance as to how the accommodation regulation runs afoul this test other than arguing that the regulation "clearly places the sanction of law behind religion by facilitating and encouraging employees to take time off from their jobs for religious observances so that employees with religious beliefs are aided as against nonbelievers." [Def. TWA Br. pp. 24-25]

It has been well established, however, that not every law that confers an incidental benefit on a religious institution or a person of a particular religion is, for that reason alone, constitutionally invalid. See, e.g., *Walz* v. *Tax Commissioner*, 397 U.S. 664 (1970), which held that a state could, consistent with the Establishment Clause, choose not to tax church property. Cf. *Luetkemeyer* v. *Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973).

The duty to accommodate, as stated in 42 U.S.C. §2000e(j), reflects the general secular legislative purpose of guaranteeing an employee that he will not be discharged from his job merely because of his religion. Consistent therewith, the regulation also imposes a duty to accommodate. The incidental effect of the regulation perhaps indirectly aids religion but its primary effect is to guarantee job security. The purpose and effect of the law as interpreted by the regulation is not primarily to aid religion but to prevent employers from devising means to discriminate which are not facially discriminatory but which do discriminate in effect and intent.

Finally, the regulation does not involve excessive government entanglement with religion. The regulation simply requires the employer to make affirmative efforts to accommodate the employee's religion. No further involvement is necessary than a judgment by the E.E.O.C. or the court that no such accommodation was made. That is not the kind of entanglement contemplated in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), and *Tilton* v. *Richardson*, 403 U.S. 672 (1971).

We find and conclude, therefore, that the interpretation of Title VII's prohibition of discrimination by reason of religion, as embodied in the E.E.O.C. regulation, 29 C.F.R. §1605.1(b) does not violate the Establishment Clause of the First Amendment to the Constitution of the United States.

We must now determine whether TWA did in fact take steps to make an accommodation to plaintiff's religious needs. The interpretation of the statute embodied in the regulation requires that the employer show that it was unable to reasonably accommodate the employee's religious observance without undue hardship on the conduct of the

employer's business. See, e.g., *Riley* v. *Bendix Corporation*, 464 F. 2d 1113, 1118 (5th Cir. 1972).

TWA argues that it made three efforts to reasonably accommodate plaintiff's beliefs, that these were not successful from plaintiff's point of view, and that it was unable to make any further efforts. In April, 1968, plaintiff wrote Everett Kussmann, Manager of Stores Systems, asking for Friday sunset to Saturday sunset off (Pl. Ex. 1). In response to that request Kussmann (1) agreed to the union steward seeking to swap or days off; (2) to excuse time off on religious holidays if plaintiff agreed to work on "Christian" holidays if requested; and (3) to attempt to find plaintiff another job (Pl. Ex. 16). On May 7, 1968, the steward reported that he was unable to work out scheduling changes and that he understood that no one was willing to swap days with plaintiff (Pl. Ex. 17). TWA did not take part in the search for employees willing to swap shifts (Tr. 348) and it was admitted at trial that the Union made no real effort (Tr. 346-350). Plaintiff, however, was able for a period of time to work out his day off requirements within the framework of the seniority system (Tr. 214).

On October 4, 1968, plaintiff wrote a letter to Kussmann, informing him that he had worked out his days off requirement by transfer to the 11-7 shift and renewing his request for specific religious holidays off (Pl. Ex. 2). In response, Kussmann reiterated his offer to permit time off on plaintiff's religious holidays whenever possible and requested a list of those holidays (Pl. Ex. 3). On October 20, 1968, plaintiff supplied such a list and expressed his gratitude for Kussmann's "understanding and cooperation." (Pl. Ex. 4).

On December 2, 1968 plaintiff transferred from Building 1, where he had sufficient seniority to maintain a

shift in which he could observe his Sabbath, to Building 2, where he was near the bottom of the seniority list and could not be assured a satisfactory shift. His reason for the change was that he was married at that time and a change to Building 2 permitted him to work the day shift and have his evenings free (Tr. 39). On March 7, 1969, a man of less seniority than plaintiff went on vacation and plaintiff was required to work in his position, which required him to work on Saturday (Tr. 39).

Kussmann anticipated difficulties due to the events described above and so arranged a meeting on March 6 with plaintiff and the union steward, James Tinder (Tr. 131). At that meeting Kussmann offered to accommodate plaintiff's religious observance by agreeing to any trade of shifts or change of sections that plaintiff and the union could work out (Tr. 131-132). Any shift or change was impossible within the seniority framework and the union was not willing to violate the seniority provisions set out in the contract to make a shift or change.

TWA claims that any further action on its part would have caused undue hardship to the conduct of its business. First, had TWA forced another employee to trade shifts or jobs with plaintiff, such action would have violated the seniority provisions of the labor management contract and TWA would have been subjected to personnel problems and grievances (Tr. 157, 193).

Had TWA simply granted plaintiff days off on Saturday it would have left TWA short of help in that position. Plaintiff worked in the Stores Department of TWA's facilities at Kansas City International Airport (KCI). That department is responsible for housing, retaining, and making available parts for use by TWA for use at its overhaul base at KCI and throughout its system. It operates on a twenty-four hour, seven-day-a-week basis. On weekends TWA worked a minimum number of employees and plaintiff was the only person in his job on his shift during the weekends. To leave that position empty would have impaired the supplying of parts for essential airline operations (Tr. 220, 221, 264, 265, 286, 360, 361). To fill plaintiff's position with someone from another area would deprive that area of its regular manpower (Tr. 221, 262, 293, 294, 362). To bring in a man not working on that day would force TWA to pay premium wages for the time he filled in for plaintiff (Tr. 221, 263, 294).

TWA argues also that if all employees were treated uniformly as to their religious beliefs and observances, it could be very difficult to perform seven-day-a-week airline operations.

We find and conclude that TWA's actions with respect to working out plaintiff's religious observance was a reasonable accommodation by TWA and that any further action by TWA would have worked an undue hardship on the conduct of its business. The duty to accommodate does not require that an employer make every effort short of going out of business to permit his employees to stay on the job and also to observe their religion. The term "*reasonable* accommodation" (emphasis added) should be read with the term "undue hardship" to arrive at the proper standard.

The duty imposed on an employer by Title VII is not a duty to impose hardships on the rest of his employees or members to accommodate the religious beliefs of a few. It is simply a duty to take affirmative action to try to find a way to permit the employee to observe his religion as he wishes, as opposed to a duty simply not to intentionally discriminate. A study of very few cases that have decided the question of whether an employer has made a reasonable accommodation does not contradict that construction.

In *Jackson* v. *Veri-Fresh Poultry, Inc.*, 304 F. Supp. 1276 (E.D. La. 1969), plaintiff, a Seventh Day Adventist, was discharged from her position as a chicken picker when she advised the company that she would be unable to work between 5:00 p.m. Friday and 5:00 p.m. Saturday because of the requirements of her religion. There was no evidence that the company made any effort to accommodate her or that it would suffer undue hardship if it did not permit her the time off she requested. The company simply advised her that if she would not work company hours, she would be discharged. The Court found for plaintiff and ordered that she receive back pay.

In *Riley* v. *Bendix Corp.*, 404 F. 2d 1113 (5th Cir. 1972), the Circuit Court of Appeals for the Fifth Circuit reversed the decision by the district court, reported at 330 F. Supp. 583 (M.D. Fla. 1971), that plaintiff was not entitled to relief because there was no intentional discrimination on the part of the company. The Court of Appeals held that the E.E.O.C. regulation was a valid interpretation of the Act and that, therefore, the company had the burden of proving that it had attempted to make reasonable accommodations. The Court found no evidence on the record that the employer was unable to reasonably accommodate Riley's religious observance or practice without undue hardship on the employer's business.

In *Reid* v. *Memphis Publishing Co.*, 468 F. 2d 346 (6th Cir. 1972), the Court of Appeals for the Sixth Circuit reversed the decision by the district court that an employer had no duty to accommodate an employee's religious belief. The Court remanded the case with instructions that the trial court consider evidence on the issue of whether the employer could reasonably accommodate plaintiff's religion without undue hardship.

On remand the district court in *Reid* v. *Memphis Publishing Co.*, 7 F.E.P. cases 13 (W.D. Tenn., December 17,

1973) found that the employer had not offered any accommodation to the plaintiff and that no undue hardship would result in permitting the plaintiff, a Seventh Day Adventist, and a copyreader for the defendant, to have Saturday off. Specifically, the court found that the newspaper had other copyreaders who could take plaintiff's place, that the newspaper's evidence concerning scheduling difficulties, morale problems, and financial burden was not sufficient to show undue hardship. The evidence on undue hardship, the court stated, was not specific and not of the requisite strength to sustain the employer's burden of proof.

In *Claybaugh* v. *Pacific Northwest Bell Telephone Co.*, 355 F. Supp. 1 (D. Ore. 1973), the plaintiff was discharged from his job at one of Bell's operations that had a round-the-clock, seven-days-a-week schedule after he joined the Seventh Day Adventist Church and refused to work on his Sabbath, Saturday. The evidence showed that the employer would encounter difficulties in permanently changing plaintiff's schedule to meet his demands. The court found, however, that the employer had made absolutely no affirmative effort to accommodate plaintiff's religious observance. The company did not try to temporarily accommodate plaintiff, which it was clearly able to do, while attempting to find a permanent solution. It did not look for a possible trade with another employee nor an open position into which plaintiff could move to avoid the conflict with his religious beliefs. The court concluded that Bell had not made a reasonable accommodation.

In none of the cases cited did the employer show that it had taken affirmative action on behalf of the employee. In this case, and in sharp contrast, TWA established as a matter of fact that it did take appropriate action to accommodate as required by Title VII. It held

several meetings with plaintiff in which it attempted to find a solution to plaintiff's problems. It did accommodate plaintiff's observance of his special religious holidays. It authorized the union steward to search for someone who would swap shifts, which apparently was normal procedure (Tr. 349). Witnesses for TWA testified that they attempted to work out plaintiff's problems in ways that had proved successful in similar cases (Tr. 305).

TWA would not have been placed in a position where it could not work out plaintiff's problems had plaintiff, to suit his own convenience, transferred to Building 2 where he had insufficient seniority to bid on a suitable shift. That factor, however, should be viewed as a frustration of TWA's attempts to accommodate, and not as an action which relieved TWA of the duty to accommodate, as TWA argues.

We find and conclude that further accommodation by TWA would have worked an undue hardship on the conduct of its business. TWA had two choices for further accommodation: (1) to simply allow plaintiff to take his time off and attempt to replace him; or (2) to force another employee to change shifts.

TWA runs a twenty-four-hour-a-day, seven-days-a-week operation. Plaintiff performed an important job for TWA and was the only person performing his particular job on his shift during the weekend. To replace him with an employee from another area would leave that employee's work crew short. To replace him with an employee who was not regularly scheduled to work at that time would have caused TWA to pay premium wages. Both of these solutions would have created an undue burden on the conduct of TWA's business. Title VII cannot be interpreted to require that companies finance employee's religious beliefs.

TWA is a party to a labor-management contract which clearly sets out a seniority provision which is binding on the company and on the union. (Article VI (b), Pl. Ex. 30). With respect to any asserted duty on the part of TWA to change plaintiff's shift in violation of the seniority provisions of the labor-management contract, the same considerations apply here as applied with respect to the union. Title VII does not force TWA to impose upon other employees because of one employee's religious belief. TWA's business includes the administration of its many employees and to impose hardships upon them imposes hardships upon the company's business. We find and conclude, therefore, that it would have been an undue hardship for TWA to have changed plaintiff's shift in violation of the seniority provision of the labor-management contract.

Finally, we again make reference to the seniority provisions of Title VII, 42 U.S.C. §2000e-2(h), which exempts different treatment to different employees based upon a bona fide seniority system from the other provisions of §2000e-2. That section, as we stated in reference to the union's duty to accommodate, indicates that Congress did not intend that unions or employers be required to take actions that would impinge upon bona fide seniority systems.

For the reasons stated, we find and conclude that neither TWA nor any of the three unions violated Title VII of the Civil Rights Act of 1964 by reason of its discharge of plaintiff for his refusal to work on his Sabbath. Accordingly, it is

ORDERED that the Clerk of the Court enter judgment for defendants.

Kansas City, Missouri
May 15, 1974

EXCERPTS FROM AGREEMENT BETWEEN TRANS WORLD AIRLINES, INC., AND THE MECHANICS AND RELATED EMPLOYEES IN THE SERVICE OF TRANS WORLD AIRLINES, INC., AS REPRESENTED BY INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

AGREEMENT
BETWEEN
TRANS WORLD AIRLINES, INC.
AND
THE MECHANICS AND RELATED EMPLOYEES
IN THE SERVICE OF
TRANS WORLD AIRLINES, INC.
AS REPRESENTED BY
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND
AEROSPACE WORKERS

ARTICLE II

Scope of Agreement

(a) The Company agrees all work generally recognized as mechanical inspection work, mechanic's work, and helper's work performed in and about Company shops, major stations, overhaul bases, line service stations, and other Company facilities, including but not limited to mechanical work involved in dismantling, overhauling, repairing, fabricating, assembling, welding, and erecting all parts of airplanes, airplane engines, radio equipment, electrical systems, heating systems, hydraulic systems, and machine tool work in connection therewith, and including the dismantling, repairing, assembling, and erecting of all machinery and mechanical devices and automotive and building maintenance and repair work, the work of Fire Inspectors, the work of Store Clerks, and the work of Ramp Servicemen in the handling of stores stock, commissary supplies, mail, express, cargo, and freight is recognized as coming within the jurisdiction of the International Association of Machinists and is covered by this Agreement.

* * *

(c) It is agreed that all work covered by this Agreement shall be performed by employees in the classifications specified herein, except that at other than major stations or overhaul bases on shifts where there is not sufficient work as herein described for Ramp Servicemen to justify the assignment of an employee coming within such classification, any employee who is in the same or higher pay bracket may be assigned to do the work. At stations other than major stations or overhaul bases on shifts where Ramp Servicemen are assigned and there is not sufficient work to justify the assignment of an additional employee in such classification, any employee covered by the Agreement who is in the same or higher pay bracket may be assigned to do the work. Except at overhaul bases, employees in the same or higher pay bracket may be assigned to do the work of Fire Inspectors where there is insufficient Fire Inspector work to justify the assignment of an employee so classified.

The number of employees in each classification will be established by the Company in accordance with the normal requirements of the service. Employees will normally perform the work of their classification; however, it is recognized that at major cities (1) where more than the scheduled number of flights are on

the ground at one time, (2) in cases of emergency where it is necessary in order to maintain operating requirements, or (3) where work within their regular classification is not available any employee who is in the same or higher classification may be assigned to the performance of work normally performed by the classifications of Ground Service Helper, Fleet Service Helper, Ramp Serviceman, or Janitor. In this event it is understood, however, that employees outside the classifications covered by this Agreement will not be assigned to perform this work if employees in the same or higher classifications covered by this Agreement are available and can be assigned without interfering with their regular duties. When an employee is assigned the work outside his classification, another employee in a different classification shall not perform the regular duties of the employee so assigned. If the Union doubts the fairness of the assignment, it may invoke the grievance procedure for settlement of the matter.

The total mechanical work force and the number of mechanics necessary in each specialty will be established in accordance with the normal work-load requirements. Mechanics will confine their work to their specialty except (1) when work within their own specialty is not available, mechanics may be assigned to any mechanical work; and (2) during abnormal operating conditions mechanics may be assigned to any work in the same or lower pay classification other than that to which they are normally assigned, to the extent necessary to maintain flight schedules, even when work within their regular assignment is available.

* * *

ARTICLE IV

Classifications of Work

* * *

(b) Stores Classifications

(1) Stores Clerk

A Stores Clerk will do all work generally recognized as the routine duties of a Stores Clerk in and about the Company storerooms and stockrooms. The duties of a Stores Clerk shall include the delivering of parts and materials at overhaul bases and other places where mechanics do not accomplish this work. The duties of a Stores Clerk shall also include the driving of trucks in transporting stores supplies.

(2) Lead Stores Clerk

A Lead Stores Clerk will be familiar with all the duties of a Stores Clerk and will be capable of performing all such duties and will perform such duties if directed by the Company. In addition, he will be a working leader of a group.

(3) Receiving Inspector

A Receiving Inspector will be capable of inspecting and will inspect material received by the receiving section when inspection is required or assigned. It is understood that these employees will not do any work recognized as mechanics' work.

* * *

ARTICLE VI

Seniority

* * *

(b) The principle of seniority shall apply in the application of this Agreement in all reductions or increases of force, preference of shift assignment, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement.

* * *

(g) General:

* * *

(4) Except as hereafter provided in this paragraph, seniority shall apply in selection of shifts and days off within a classification within a department at a point. During the first ninety (90) days of their employment, probationary employees may be assigned such shifts and days off as determined by the Company. Seniority may be exercised only in case of bumping due to a reduction in force or when an opening occurs. At locations where seven (7) or more employees are assigned to the daylight shift, members of the Union's Local Committee designated in accordance with Article XI (a) (1) shall have preference of assignment to such shift and preference of assignment to Saturday and Sunday off, provided that such member has the ability to perform, in a satisfactory manner, the work required of the particular job. Such preference shall continue only during the respective terms as Committeemen and only so long as they are assigned to fixed shifts. At locations where employees work rotating shifts, members of the Union's Local Committee shall have preference of assignment to Saturday and Sunday off. In preparing days off and shift schedules, the Company will determine how many employees are needed based on the type of work needed and the classification.

An employee who is notified that his shift and/or days of preference has been accepted and then refuses to accept such assignment will not be permitted to bid for a different shift and/or days off assignment for six (6) months after such refusal. This shall not apply at any location where shift and day off preference are solicited verbally. An employee may withdraw his bid at any time prior to the time the local Union representative is notified of an opening.

* * *

ARTICLE VII

Hours of Service

* * *

(b) Forty (40) hours, consisting of five (5) eight-hour days, worked within seven (7) consecutive days, midnight Sunday to midnight Sunday, will constitute a standard work week. Each employee will have two (2) consecutive days scheduled as regular days off in each work week, and the only deviation from this practice of two (2) consecutive days off will be where under the local schedule adopted, it is found necessary to rotate scheduled days off and in order to repeat the schedule, deviation is necessary. At overhaul bases, every reasonable effort will be made in the future to arrange work schedules to allow Saturday and Sunday as regular scheduled days off. The fixing

of a work schedule allowing part of the employees of a facility Sunday of one week and Monday of the following week as regularly scheduled days off will not be deemed a violation of this provision. Five (5) days' notice must be given of change in the schedule of days off.

* * *

Article VIII

Overtime and Holidays

(a) Overtime rate of time and one-half, computed on an actual minute adjusted to the nearest tenth of an hour basis with a minimum of one (1) hour overtime, shall be paid for all work performed in excess of eight (8) hours in any one day, for all work performed either in advance of or after regularly scheduled hours, and for the first eight (8) hours worked on one of the two regularly scheduled days off each work week.

* * *

(d) Employees covered by this Agreement will observe the following holidays: New Year's Day, Washington's Birthday, Good Friday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day. Should any of the foregoing holidays fall on a Sunday, the following Monday shall be considered as the holiday, and should any of the foregoing holidays fall on a Saturday, the preceding Friday shall be considered as the holiday. Any employee required to work on any of the foregoing holidays shall be compensated at the rate of double time and a half.

* * *

(g) Except in an emergency, an employee will not be required to work overtime against his wishes.

* * *

Article XIX

Shift Premiums

* * *

(c) The Company and the Union may, at any point, change from fixed to rotating shifts, or vice-versa, by mutual agreement.

The Company may establish relief schedules which require employees to work on different shifts in order to provide day off and vacation relief for other employees. In establishing rotating vacation relief schedules every effort will be made to avoid rotation between shifts during the work week. Except as provided in Article II(c), a rotating relief employee(s) shall not perform work out of his classification. The rotating relief shall have two consecutive days off each week and shall not rotate shifts more often than twice each week. An employee on a relief schedule who does not rotate between shifts during his work week shall be paid shift premiums in keeping with paragraph (a) and (b) of this Article, as applicable. An employee on a relief schedule who is scheduled to work on the day and afternoon shifts during a work week shall receive sixteen (16) cents per hour above the day shift rate for all shifts worked. An employee on a relief schedule who is scheduled to work on the (1) afternoon and night shifts, (2) day and night shifts, or (3) day, afternoon and night shifts during a work week, will receive twenty-one (21) cents per hour above the day shift rate for all shifts worked. Relief positions shall be bid and filled in accordance with Article VI.

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF MISSOURI, MAY 15, 1974

LARRY G. HARDISON, Plaintiff,

v.

TRANS WORLD AIRLINES et al.,
Defendants.

No. 20096-1.

United States District Court,
W. D. Missouri, W. D.

May 15, 1974.

MEMORANDUM AND ORDER

JOHN W. OLIVER, District Judge.

This is an action by an individual plaintiff against his former employer, Trans World Airlines (TWA) and three labor organizations, International Association of Machinists and Aero Space Workers (The International), International association of Machinists and Aero Space Work-Workers, District 142 (District 142), and International Association of Machinists and Aero Space Workers, Local 1650 (Local 1650) seeking redress from alleged religious discrimination in violation of the Civil Rights Act of 1964. Plaintiff asserts that his discharge from employment because of his refusal to work from sundown Friday to sundown Saturday pursuant to the tenets of his religion was a violation of his religious liberty, contrary to 42 United States Code, § 2000e-2. Plaintiff is a member of the Worldwide Church of God.

The jurisdiction of this Court is based upon 42 United States Code, § 2000e-5(f). Defendant TWA is an em-

ployer engaged in interstate commerce and subject to Title VII of the Civil Rights Act of 1964, 42 United States Code, § 2000e et seq. Defendant unions are labor organizations likewise subject to the provisions of Title VII.

I.

Defendants first argue that this Court does not have jurisdiction in this case because of the alleged failure of the plaintiff to comply with the filing deadline of 42 U.S.C. § 2000e-5(d). That argument is answered by the decision of our controlling court in Richard v. McDonnell Douglas Corporation, 469 F.2d 1249 (8th Cir. 1972), which held that the 210-day statute of limitations is tolled upon receipt of the complainant's complaint by the E.E.O.C. Accordingly, in this case plaintiff's complaint of August 29, 1969, tolled the 210-day statute of limitations so that even if we assume that the E.E.O.C. assumed jurisdiction of plaintiff's case on November 18, 1969, the latest arguable date, plaintiff perfected his federal remedy well within the proper time. We find and conclude, therefore, that we do have jurisdiction of this case under the provisions of 42 U.S.C. § 2000e-5(d).

The defendant International challenges this Court's jurisdiction over it on the ground that there was no proper service of process on that organization. The alleged service was made by serving a copy of the complaint on James Tarwater, the financial secretary of Local 1650, who had no official capacity with the International.

We find and conclude that Local 1650 and The International are not autonomous and that, therefore, service upon the local constitutes valid service of process on The International. See Deboles v. Trans World Airlines, Inc., 350 F.Supp. 1274 (E.D.Pa.1972) and Claycraft Co. v. United Mine Workers of America, 204 F.2d 600 (6th Cir. 1953).

We further find and conclude that because Local 1650, District 142, and The International are not autonomous, the interests of the latter two organizations were adequately represented before the E.E.O.C. by Local 1650. The argument, therefore, of defendants, District 142 and The International, that they could not be sued in federal court because they were not named in the complaint before the E.E.O.C. is without merit. See Moody v. Albemarle Paper Co., 271 F.Supp. 27 (E.D.N.C.1967).

Defendants argue also that plaintiff failed to exhaust his administrative remedies, first, because he did not pursue administrative remedies set out in the Railway Labor Act (45 U.S.C. § 151 et seq.) and, second, because he did not otherwise pursue contract grievance procedures. The first argument is answered by Norman v. Missouri Pacific Railroad, 414 F.2d 73 (8th Cir. 1969), which reversed the district court's dismissal of a complaint filed pursuant to Title VII of the Civil Rights Act of 1964. The Court of Appeals held that the complaint was cognizable under the Civil Rights Act absent specific prohibitions in the Railway Labor Act and that the Railway Labor Act did not foreclose efforts of employees to secure their statutory rights under the Civil Rights Act. No specific prohibition in the Railway Labor Act has been cited by defendants.

The second argument is answered by the recent decision of the Supreme Court in Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (February 19, 1974), which held that an employee is not foreclosed from suing in federal court under Title VII of the Civil Rights Act of 1964 after arbitration proceedings resulted in an unfavorable ruling. The Court concluded that no election of remedies principles inhered in Title VII. Submission of a claim to one forum does not preclude a later submission to another, Justice Powell declared in the majority opinion. It follows, therefore, that plaintiff can choose to proceed under Title VII without resorting to grievance procedures at all.

II.

The relevant factual circumstances of this case are not substantially disputed. Many of the facts stipulated by the parties in Standard Pretrial Order No. 2 are simply not relevant. Other findings suggested by the parties in which there is dispute are for the most part irrelevant. The facts as we have found them include only those relevant to the resolution of the legal questions presented and for the most part are those which admit of very little dispute. The following discussion will serve as our findings of fact and conclusions of law pursuant to Rule 52(a), Federal Rules of Civil Procedure.

A. *Union Responsibility*

Plaintiff names the three union defendants in his complaint and asks for an injunction against the unions to prevent them from failing to adequately represent the plaintiff and from depriving plaintiff of his right to freely exercise his religious beliefs without discrimination by the union. In his suggested conclusions of law, plaintiff states merely that defendant unions "discriminated against plaintiff by reason of his religion in violation of the Civil Rights Act of 1964 by enforcing a collective bargaining agreement which was discriminatory against plaintiff in its application." Plaintiff cites a number of cases in support of this proposition without discussion. We have studied all of those cases. Most are entirely irrelevant to the issue of whether the union should be held responsible for the violation, if any, of the Civil Rights Act

of 1964. Others are relevant only by broad application of the principles stated therein.

Labor union compliance with the Civil Rights Act of 1964 is dictated by 42 U.S.C. § 2000e-2(c):

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Although it is nowhere stated directly by plaintiff, it appears that he is complaining that the union discriminated against him because of its failure to refuse to comply with the seniority provisions of the collective bargaining agreement between TWA and The International, which governed plaintiff's employment. A violation of those provisions would have been required in order to adjust his

schedule with one of the other workers on his shift so that he would be able to observe his Sabbath.

Plaintiff, in arguing that the Unions discriminated against him by "enforcing a collective bargaining agreement which was discriminatory against plaintiff in its application," is arguing that the Union acted wrongly by standing by the contract and refusing actively to support plaintiff's efforts to avoid the seniority provisions of the contract. This actually amounts to an assertion that the Union has a rather stringent duty to accommodate.

The duty to accommodate, which we shall discuss in more detail later in this opinion, at the time the alleged discrimination in this case took place, was required by E.E.O.C. guideline 29 C.F.R. § 1605.1:

> (b) The Commission believes that the duty not to discriminate on religious grounds, required by Section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation *on the part of the employer* to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. [Emphasis supplied]

The Unions interpret this language to mean that the duty is imposed only on the employer. They argue that that limitation was intentional because, they contend, a union has no power to accommodate. The Union only has power to control its own organization, make collective bargaining agreements with the employer, and enforce those agreements. The employer, the Unions conclude, is the only one who is in a position to accommodate.

We disagree. The language of the regulation does speak in terms of the employer but so have other pro-

visions and regulations pursuant to the Act, which have been interpreted to include the union. For example, 42 U.S.C. § 2000e-2(h), the provision on seniority systems discussed below has been applied to unions. See, e. g., Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969).

Furthermore, this case is a perfect example of a situation in which a union could accommodate a member if required to do so. TWA agreed that plaintiff could change shifts if the union approved. Such approval would mean that the union would have to suspend the operation of the seniority rules in plaintiff's case. Had the union made this accommodation, plaintiff would have been able to observe his Sabbath as he wished. The question, however, is whether Title VII imposed upon the unions the duty to ignore their contract under the circumstances of this particular case.

We do not believe that Title VII goes that far. We find and conclude that to require the union to ignore seniority in every case in which an employee with lesser seniority can observe his Sabbath only by changing shifts with a more senior employee would work an undue hardship on the union.

In an article written after Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), Professor Harry E. Edwards and Mr. Joel H. Kaplan expressed concern that the E.E.O.C. regulation imposing the duty to accommodate places an intolerable burden on the employer. They described the burden of proving undue hardship as "nearly impossible to demonstrate if the work force is large enough." Edwards and Kaplan, Religious Discrimination and the Role of Arbitration Under Title VII, 69 Mich.L. Rev. 599, 628 (1971). They rightly argue that such an interpretation "imposes a priority of the religious over

the secular" in that it might require an employer to favor employees whose religious beliefs require them to follow different schedules than the regular over other employees, even to the point of violating the other employees' bargained for rights. The same considerations apply in the case of the unions.

The labor-management contract to which the union is a party clearly sets out the seniority rules which are binding on the company and the union (Article VI(b), Pl.Ex. 30). That contract, of course, can not operate in violation of the laws of the United States but we do not believe that Title VII requires that the seniority provisions be ignored. Professor Edwards and Mr. Kaplan discussed this problem at length:

> Assume that an employer operates a seven-day-a week operation, that he has entered into a collective bargaining contract with the union, and that the contract provides for shift preference by seniority. What if a low-seniority employee, who works a shift that includes Saturday and Sunday, converts to a religion that requires him not to work on one of those days? Must the employer then transfer this employee out of a Sunday or Saturday shift even though numerous employees with greater seniority are required to work over the weekend? Under the E.E.O.C. guidelines, the transfer of one employee could hardly be said to create an "undue hardship" for the employer, but what of the other employees? What of the hardship imposed on the employee who waited a long time to acquire sufficient seniority in order to avoid weekend work and is now forced back into it because of someone else's religious beliefs? Are the religious beliefs of one individual so weighty that they supersede the lack of religious beliefs of another? [69 Mich.L.Rev. at 628].

Professor Edwards and Mr. Kaplan argue that the E.E.O.C. guidelines are confusing and could be construed to require the employer in every case to shift an employee out of seniority to accommodate religious beliefs. We do not believe that the E.E.O.C. guidelines require such a result. The hardship on employees should certainly be considered as hardship on the conduct of business, for the management of employees is one of the chief concerns of a large business and, in the case of a labor union, is the chief concern. A hypertechnical application of the words "undue hardship of the employer's business" by ignoring this fact, would, as Professor Edwards and Mr. Kaplan argue, impose "a priority of the religious over the secular" [69 Mich.L.Rev. at 628] and would perhaps raise constitutional questions.[1] See Dewey v. Reynolds Metals Co., 429 F.2d 324, 334-335 (6th Cir. 1970). We find and conclude, therefore, that it would have been an undue hardship for the unions to have changed plaintiff's shift in violation of the seniority provisions of the labor management contract.

Finally, with reference to the seniority provisions, we find and conclude that 42 U.S.C. § 2000e-2(h), if not absolutely controlling, at least indicates that Congress did not intend that unions or employers be required to take actions that could impinge upon bona fide seniority systems. That Section reads as follows:

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1. Professor Edwards and Mr. Kaplan direct attention to Judge Learned Hand's decision in Otten v. Baltimore & Ohio R.R., 205 F.2d 58, 61 (2d Cir. 1953), in which he stated:

> The First Amendment protects one against action by the government . . . but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. . . . We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world.

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. [42 U.S.C. § 2000e-2(h)].

A significant judicial gloss has been placed on this language by courts processing racial discrimination cases. Consequently, a seniority system can not be "bona fide" if it perpetuates the consequences of past discrimination. In other words, a seniority system is not lawful if it freezes Negroes into past patterns of discrimination. See Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), cert. dismissed, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971); Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC v. United States, 416 F.2d 980 (5th Cir. 1969); and Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D.Va.1968).

Plaintiff does not urge, nor, do we think, may he urge, that the seniority system in this case locked in any discrimination against individuals of plaintiff's or anyone else's religion. The seniority system was not designed with the intention to discriminate against religion nor did it act to lock members of any religion into a pattern wherein their freedom to exercise their religion was limited. It was coincidental that in plaintiff's case the seniority system acted to compound his problems in exercising his religion. He did not have sufficient seniority in the building to which he transferred to be able to impose his choice of days off over those of the other employees who had more seniority.

The duty to accommodate under the circumstances of this case, therefore, did not require the union to ignore its seniority system. It did, however, require that the union fairly represent the plaintiff when it became aware of the fact that plaintiff was facing difficulty in scheduling for his Sabbath and that he was in danger of disciplinary action by the company. See Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 988 (D.C.Cir. 1973), and United States v. Bethlehem Steel Corp., 312 F.Supp. 977, 988 (W.D. N.Y.1970), rev. on other grounds, 446 F.2d 652 (2nd Cir. 1971). A union always has an affirmative duty to protect its members from unlawful discrimination in its area of authority, i. e., negotiating a nondiscriminatory contract, Robinson v. Lorillard Co., *supra;* or processing grievances of discrimination, United States v. Bethlehem Steel Corp., *supra.*

In this case, since the collective bargaining agreement was essentially nondiscriminatory, it can only be argued by plaintiff that the unions failed to properly process his grievance. We do not believe that the facts sustain such a charge.

The union first learned about plaintiff's problem at a meeting that Hardison had with Everett Kussmann, Manager, Stores Systems, on September 6, 1968, and at which James Tinder, Local 1650 steward, was present. At that meeting, plaintiff's requirements for time off on religious holidays were discussed and Kussmann agreed that the steward should seek to swap days off, to excuse time off on specific religious holidays if plaintiff agreed to work on regular holidays, and to attempt to find plaintiff another job (Pl.Ex. 16). There was no evidence that Tinder took any active part in that meeting. After the meeting plaintiff, on October 9, 1968, wrote Kussmann stating his satisfaction in the arrangements discussed and advising Kussmann that he had transferred to the 11 to 7 shift, which did allow him to observe his Sabbath (Pl.Ex. 2).

On December 2, 1968, plaintiff voluntarily transferred from Building 1 where he had sufficient seniority to bid on a shift which would allow him to observe his Sabbath, to Building 2, where he was second from the bottom in seniority.

Kussmann arranged for a meeting to be held on March 6, 1969 to discuss ways to avoid any difficulty that might arise because of plaintiff's new schedule. The Local 1650 steward, Mr. Tinder, was present at that meeting. Apparently several possibilities for meeting plaintiff's requirements were proposed: (1) changing plaintiff's shift; (2) changing plaintiff's job; and (3) allowing plaintiff to work four days a week. Tinder was amenable to working out plaintiff's problem on any of the above bases, subject, however, to the seniority provisions of the contract. On that date there were no jobs open for bid nor did plaintiff have sufficient seniority to bid on any other job (Tr. 168). The seniority provisions, therefore, precluded the possibility of plaintiff's changing his shift (Tr. 82-85, 154-155, 157-169, 193, 225-227). They also prevented plaintiff from changing his job (Tr. 167-168). The company was unwilling to permit plaintiff to work only four days a week (Tr. 270).

Plaintiff, therefore, was not satisfied with the results of this meeting. He did not, however, file a grievance with the grievance committee as he knew he had a right to do (Tr. 169).

Plaintiff was absent from work on March 8, March 15, and March 22, 1969. On March 21, plaintiff met with A. J. Butcher, Supervisor, Stores Planning and Control, and James Tinder. As a result of that meeting Butcher

wrote plaintiff on the same day advising him that a discharge hearing would have to be scheduled (Pl.Ex. 6).

Before the discharge hearing, the grievance committee met with plaintiff for approximately an hour and discussed the possible approaches to resolving the problem. Finally, the grievance committee decided that the best approach would be for plaintiff to remain on the job, pleading for leniency at the discharge hearing, and if that hearing resulted in discharge, to attempt to obtain a reversal of that decision at a higher level (Tr. 385). The possibility of the union waiving its seniority provisions so that plaintiff could get on a different shift was apparently not discussed (Tr. 389-391). Plaintiff told the committee to use its own judgment in presenting the grievance (Tr. 387).

After the meeting, but before the discharge hearing, plaintiff changed his shift to the twilight shift, which permitted him to have Saturdays off. The testimony was that the union believed at this time that its problems were solved (Tr. 391). But on March 28, 1969, plaintiff quit work at sundown and it became immediately apparent that the union would not be able to argue that plaintiff should not be dismissed because his conflicts had been resolved (Tr. 391-392).

Immediately prior to the discharge hearing on March 31, 1969, the union held another meeting with plaintiff and reviewed the various approaches to the problem and the procedures for appealing to District 142 if the company decided to discharge plaintiff (Tr. 392-393). Plaintiff was told that he should sit next to Earl Box, Chairman of the Grievance Committee, so he could object to any errors made by the Committee.

At the hearing, the union argued against discharge on the grounds that procedural errors had been made

and that discharge was too severe a penalty for the infractions with which plaintiff was charged (Joint Stip. 31).

Immediately after the discharge hearing Box again explained the appeals procedure to plaintiff (Tr. 397). On April 12, 1969, a letter was sent to plaintiff explaining that he had been found guilty of insubordination and was therefore, discharged. Several days later plaintiff again met with the Grievance Committee and asked about the possibilities of his resigning to keep his record clean. He was told that the company would probably not accept his resignation and was again told of appeal procedures and that the Local would forward the case to the District (Tr. 398).

Joseph Whitney Bowers, General Chairman of District 142, attempted several times but was unable to contact plaintiff (Tr. 446, 452). He finally arranged two different meetings with plaintiff, through plaintiff's father-in-law, Cyrus See (Tr. 444, 457). Plaintiff failed to make either one of them and Bowers, pursuant to standard procedures, dropped the case (Tr. 405-406).

In light of our findings of fact with regard to the union's actions in processing plaintiff's case, we find and conclude that the unions did not violate their duty to plaintiff under Title VII of the Civil Rights Act of 1964.

The duty of fair representation requires that the union act in good faith and without malice. See Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). We do not find that Local 1650's representation of the plaintiff in his dispute with TWA was arbitrary, discriminatory, or in bad faith. Any failure on the part of District 142 to pursue the matter after discharge was due entirely to plaintiff's lack of cooperation, which made it impossible to proceed with an appeal. The problem never reached

The International. We find and conclude, therefore, that judgment should be entered in favor of the three union defendants.

B. *TWA Responsibility*

Defendant TWA makes several arguments against plaintiff's contention that it violated Title VII of the Civil Rights Act of 1964 when it discharged him:

[1] A statutory requirement to accommodate religious needs of employees would violate the Establishment Clause of the First Amendment.

[2] Title VII of the Civil Rights Act of 1964 does not require employers to affirmatively accommodate employees' religious needs.

[3] TWA made reasonable accommodations to plaintiff's religious beliefs up to the point where further steps would have caused undue hardship.

[4] Plaintiff voluntarily placed himself in a position which he knew or should have known would diminish his chances for Sabbath observance.

[5] TWA did not "intentionally" discriminate against plaintiff on account of his religious beliefs. [Def. TWA Brief, pp. 35-36].

The first question that must be resolved is indicated by #2 above and that is what kind of duty to avoid religious discrimination did Title VII of the Civil Rights Act of 1964 impose upon TWA. At the time of the acts complained of, 42 U.S.C. § 2000e-2(a)(1) provided, in part, as follows:

> (a) It shall be an unlawful employment practice for an employer:

> (1) To fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

The statute did not provide for any duty on the part of an employer to accommodate the religious needs of employees.

The E.E.O.C. regulation which set out the guidelines on religious discrimination, however, provided as follows:

> (b) The Commission believes that the duty not to discriminate on religious grounds, required by Section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. . . . [29 C.F.R. § 1605.1(b)].

The question, therefore, becomes whether the E.E.O.C. regulation is a proper interpretation of the Act before it was amended to specifically include a duty to accommodate. TWA cites Dewey v. Reynolds Metals Co.; 429 F.2d 324 (6th Cir. 1970), aff'd per curiam by an equally divided court, 402 U.S. 689, 91 S.Ct. 2186, 29 L.Ed.2d 267 (1971), in support of its position that the Act did not impose a duty to accommodate. In *Dewey,* an employee alleged he had been wrongfully discharged from his employment because of his religious beliefs. The Court of Appeals held that the trial court had erred in applying the regulation, which was not in effect until July 10, 1967, to the activity of the employee, which took place in 1966.

The Court, in Riley v. Bendix Corp., 464 F.2d 1113, 1117 (5th Cir. 1972) expressed the view that *Dewey* offers no guidance on the question of whether the regulation was a valid one because it was not in effect when the acts complained of took place. We agree.

We note further, however, that in *Dewey* the employer offered the plaintiff, as well as all other employees, the option of either working on Sunday or finding a replacement. The plaintiff did find replacements for five Sundays and then refused to find others, claiming that this practice was a sin. The Court of Appeals held that even if the 1967 regulation were applied, the employer made a reasonable accommodation by offering the replacement system.

Finally, *Dewey* was based in large part on the final award of a grievance arbitrator under the labor management contract, which has nothing to do with the question at issue here.

In Riley v. Bendix Corp., *supra,* the Court held flatly that the regulation was valid. It relied in part upon the amendment of the Act, which was approved by the Congress on March 8, 1972. Far from holding that that amendment indicates that the legislative intent of the old Act was not to include a duty to accommodate, as TWA argues we should conclude, the Court in *Riley* held the amendment validated and recognized the regulation as a proper interpretation of the old Act.

The amendment to 42 U.S.C. § 2000e(j) is as follows:

> The term "religion" includes all aspects of religious observance and practice, as well as belief unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

The union's brief refers us to Eighth Circuit cases which state broad principles of statutory interpretation to the effect that amendments to statutes passed for the purpose of correcting a judicial interpretation should be applied prospectively only when Congress intended to change the former law as interpreted by the courts. That principle is obviously correct but defendants ignore the legislative history of the amendment at issue in this case.

The legislative history, reported at 118 Congressional Record, §§ 227-253, includes this statement by Senator Randolph of West Virginia, who sponsored the amendment:

> I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State or local governments. Unfortunately, the courts have, in a sense, come down on both sides of the issue. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on this question.
>
> This amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved. [118 Congressional Record at § 228]

The measure was passed in the Senate by unanimous vote.

The Chairman of the House Committee made this statement about the amendment:

> The purpose of this subsection is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in Dewey v. Reynolds Metals Company, 429

F.2d 325 [324] (6th Cir. 1970). Affirmed by an equally divided court, 402 U.S. 689 [91 S.Ct. 2186, 29 L.Ed.2d 267] (1971). [118 Congressional Record, pp. 1861-1862]

The measure was also passed in the House by unanimous vote.

We find and conclude that the legislative history of the amendment of the Act, together with the fact that weight should be given to the administrative interpretation of the Act, as reflected by the regulation (see Griggs v. Duke Power Co., 401 U.S. 424, 433, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)) indicate that regulation 29 C.F.R. § 1605.1(b) was facially valid and is controlling in this case.

We find TWA's argument that the duty to accommodate an employee's religious beliefs is a violation of the Establishment Clause of the First Amendment to be without merit. Defendant TWA correctly states the test for determination of whether a governmental action violates the Establishment Clause as it was set out in Committee for Public Education and Religious Liberty v. Nyquist et al., 413 U.S. 756, 772-773, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973); (1) that the law must reflect a clearly secular legislative purpose; (2) that the law must have a primary effect that neither advances nor inhibits religion; and (3) that the law must avoid excessive government entanglement with religion. Defendant, however, has not given the Court much guidance as to how the accommodation regulation runs afoul of this test other than arguing that the regulation "clearly places the sanction of law behind religion by facilitating and encouraging employees to take time off from their jobs for religious observances so that employees with religious beliefs are aided as against non-believers." [Def. TWA Br. pp. 24-25]

It has been well established, however, that not every law that confers an incidental benefit on a religious institution or a person of a particular religion is, for that reason alone, constitutionally invalid. See, e.g., Walz v. Tax Commissioner, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), which held that a state could, consistent with the Establishment Clause, choose not to tax church property. Cf. Luetkemeyer v. Kaufmann, 364 F.Supp. 376 (W.D.Mo.1973).

The duty to accommodate, as stated in 42 U.S.C. § 2000e(j), reflects the general secular legislative purpose of guaranteeing an employee that he will not be discharged from his job merely because of his religion. Consistent therewith, the regulation also imposed a duty to accommodate. The incidental effect of the regulation perhaps indirectly aids religion but its primary effect is to guarantee job security. The purpose and effect of the law as interpreted by the regulation is not primarily to aid religion but to prevent employers from devising means to discriminate which are not facially discriminatory but which do discriminate in effect and intent.

Finally, the regulation does not involve excessive government entanglement with religion. The regulation simply requires the employer to make affirmative efforts to accommodate the employee's religion. No further involvement is necessary than a judgment by the E.E.O.C. or the court that no such accommodation was made. That is not the kind of entanglement contemplated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), and Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971).

We find and conclude, therefore, that the interpretation of Title VII's prohibition of discrimination by reason of religion, as embodied in the E.E.O.C. regulation, 29

C.F.R. § 1605.1(b) does not violate the Establishment Clause of the First Amendment to the Constitution of the United States.

We must now determine whether TWA did in fact take steps to make an accommodation to plaintiff's religious needs. The interpretation of the statute embodied in the regulation requires that the employer show that it was unable to reasonably accommodate the employee's religious observance without undue hardship on the conduct of the employer's business. See, e. g., Riley v. Bendix Corporation, 464 F.2d 1113, 1118 (5th Cir. 1972).

TWA argues that it made three efforts to reasonably accommodate plaintiff's beliefs, that these were not successful from plaintiff's point of view, and that it was unable to make any further efforts. In April, 1968, plaintiff wrote Everett Kussmann, Manager of Stores Systems, asking for Friday sunset to Saturday sunset off (Pl.Ex. 1). In response to that request Kussmann (1) agreed to the union steward seeking to swap or days off; (2) to excuse time off on religious holidays if plaintiff agreed to work on "Christian" holidays if requested; and (3) to attempt to find plaintiff another job (Pl.Ex. 16). On May 7, 1968, the steward reported that he was unable to work out scheduling changes and that he understood that no one was willing to swap days with plaintiff (Pl.Ex. 17). TWA did not take part in the search for employees willing to swap shifts (Tr. 348) and it was admitted at trial that the Union made no real effort (Tr. 346-350). Plaintiff, however, was able for a period of time to work out his day off requirements within the framework of the seniority system (Tr. 214).

On October 4, 1968, plaintiff wrote a letter to Kussmann, informing him that he had worked out his days off requirement by transfer to the 11-7 shift and renewing

his request for specific religious holidays off (Pl.Ex. 2). In response, Kussmann reiterated his offer to permit time off on plaintiff's religious holidays whenever possible and requested a list of those holidays (Pl.Ex. 3). On October 20, 1968, plaintiff supplied such a list and expressed his gratitude for Kussmann's "understanding and cooperation" (Pl.Ex. 4).

On December 2, 1968 plaintiff transferred from Building 1, where he had sufficient seniority to maintain a shift in which he could observe his Sabbath, to Building 2, where he was near the bottom of the seniority list and could not be assured a satisfactory shift. His reason for the change was that he was married at that time and a change to Building 2 permitted him to work the day shift and have his evenings free (Tr. 39). On March 7, 1969, a man of less seniority than plaintiff went on vacation and plaintiff was required to work in his position, which required him to work on Saturday (Tr. 39).

Kussmann anticipated difficulties due to the events described above and so arranged a meeting on March 6 with plaintiff and the union steward, James Tinder (Tr. 131). At that meeting Kussmann offered to accommodate plaintiff's religious observance by agreeing to any trade of shifts or change of sections that plaintiff and the union could work out (Tr. 121-132). Any shift or change was impossible within the seniority framework and the union was not willing to violate the seniority provisions set out in the contract to make a shift or change.

TWA claims that any further action on its part would have caused undue hardship to the conduct of its business. First, had TWA forced another employee to trade shifts or jobs with plaintiff, such action would have violated the seniority provisions of the labor management contract

and TWA would have been subjected to personnel problems and grievances (Tr. 157, 193).

Had TWA simply granted plaintiff days off on Saturday it would have left TWA short of help in that position. Plaintiff worked in the Stores Department of TWA's facilities at Kansas City International Airport (KCI). That department is responsible for housing, retaining, and making available parts for use by TWA at its overhaul base at KCI and throughout its system. It operates on a twenty-four hour, seven-day-a-week basis. On weekends TWA worked a minimum number of employees and plaintiff was the only person in his job on his shift during the weekends. To leave that position empty would have impaired the supplying of parts for essential airline operations (Tr. 220, 221, 264, 265, 286, 360, 361). To fill plaintiff's position with someone from another area would deprive that area of its regular manpower (Tr. 221, 262, 293, 294, 362). To bring in a man not working on that day would force TWA to pay premium wages for the time he filled in for plaintiff (Tr. 221, 263, 294).

TWA argues also that if all employees were treated uniformly as to their religious beliefs and observances, it could be very difficult to perform seven-day-a-week airline operations.

We find and conclude that TWA's actions with respect to working out plaintiff's religious observance was a reasonable accommodation by TWA and that any further action by TWA would have worked an undue hardship on the conduct of its business. The duty to accommodate does not require that an employer make every effort short of going out of business to permit his employees to stay on the job and also to observe their religion. The term "*reasonable* accommodation" (emphasis added) should be read with the term "undue hardship" to arrive at the proper standard.

The duty imposed on an employer by Title VII is not a duty to impose hardships on the rest of his employees or members to accommodate the religious beliefs of a few. It is simply a duty to take affirmative action to try to find a way to permit the employee to observe his religion as he wishes, as opposed to a duty simply not to intentionally discriminate. A study of a very few cases that have decided the question of whether an employer has made a reasonable accommodation does not contradict that construction.

In Jackson v. Veri-Fresh Poultry, Inc., 304 F.Supp. 1276 (E.D.La.1969), plaintiff, a Seventh Day Adventist, was discharged from her position as a chicken picker when she advised the company that she would be unable to work between 5:00 p. m. Friday and 5:00 p. m. Saturday because of the requirements of her religion. There was no evidence that the company made any effort to accommodate her or that it would suffer undue hardship if it did not permit her the time off she requested. The company simply advised her that if she would not work company hours, she would be discharged. The Court found for plaintiff and ordered that she receive back pay.

In Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972), the Circuit Court of Appeals for the Fifth Circuit reversed the decision by the district court, reported at 330 F.Supp. 583 (M.D.Fla.1971), that plaintiff was not entitled to relief because there was no intentional discrimination on the part of the company. The Court of Appeals held that the E.E.O.C. regulation was a valid interpretation of the Act and that, therefore, the company had the burden of proving that it had attempted to make reasonable accommodations. The Court found no evidence on the record that the employer was unable to reasonably accom-

modate Riley's religious observance or practice without undue hardship on the employer's business.

In Reid v. Memphis Publishing Co., 468 F.2d 346 (6th Cir. 1972), the Court of Appeals for the Sixth Circuit reversed the decision by the district court that an employer had no duty to accommodate an employee's religious belief. The Court remanded the case with instructions that the trial court consider evidence on the issue of whether the employer could reasonably accommodate plaintiff's religion without undue hardship.

On remand the district court in Reid v. Memphis Publishing Co., 369 F.Supp. 684 (W.D.Tenn.1973) found that the employer had not offered any accommodation to the plaintiff and that no undue hardship would result in permitting the plaintiff, a Seventh Day Adventist, and a copy-reader for the defendant, to have Saturday off. Specifically, the court found that the newspaper had other copy-readers who could take plaintiff's place, that the newspaper's evidence concerning scheduling difficulties, morale problems, and financial burden was not sufficient to show undue hardship. The evidence on undue hardship, the court stated, was not specific and not of the requisite strength to sustain the employer's burden of proof.

In Claybaugh v. Pacific Northwest Bell Telephone Co., 355 F.Supp. 1 (D.Or.1973), the plaintiff was discharged from his job at one of Bell's operations that had a round-the-clock, seven-days-a-week schedule after he joined the Seventh Day Adventist Church and refused to work on his Sabbath, Saturday. The evidence showed that the employer would encounter difficulties in permanently changing plaintiff's schedule to meet his demands. The court found, however, that the employer had made absolutely no affirmative effort to accommodate plaintiff's

religious observance. The company did not try to temporarily accommodate plaintiff, which it was clearly able to do, while attempting to find a permanent solution. It did not look for a possible trade with another employee nor an open position into which plaintiff could move to avoid the conflict with his religious beliefs. The court concluded that Bell had not made a reasonable accommodation.

In none of the cases cited did the employer show that it had taken affirmative action on behalf of the employee. In this case, and in sharp contrast, TWA established as a matter of fact that it did take appropriate action to accommodate as required by Title VII. It held several meetings with plaintiff in which it attempted to find a solution to plaintiff's problems. It did accommodate plaintiff's observance of his special religious holidays. It authorized the union steward to search for someone who would swap shifts, which apparently was normal procedure (Tr. 349). Witnesses for TWA testified that they attempted to work out plaintiff's problems in ways that had proved successful in similar cases (Tr. 305).

TWA would not have been placed in a position where it could not work out plaintiff's problem had plaintiff, to suit his own convenience, not transferred to Building 2 where he had insufficient seniority to bid on a suitable shift. That factor, however, should be viewed as a frustration of TWA's attempts to accommodate, and not as an action which relieved TWA of the duty to accommodate, as TWA argues.

We find and conclude that further accommodation by TWA would have worked an undue hardship on the conduct of its business. TWA had two choices for further accommodation: (1) to simply allow plaintiff to take his

time off and attempt to replace him; or (2) to force another employee to change shifts.

TWA runs a twenty-four-hour-a-day, seven-days-a-week operation. Plaintiff performed an important job for TWA and was the only person performing his particular job on his shift during the weekend. To replace him with an employee from another area would leave that employee's work crew short. To replace him with an employee who was not regularly scheduled to work at that time would have caused TWA to pay premium wages. Both of these solutions would have created an undue burden on the conduct of TWA's business. Title VII cannot be interpreted to require that companies finance employee's religious beliefs.

TWA is a party to a labor-management contract which clearly sets out a seniority provision which is binding on the company and on the union (Article VI(b), Pl.Ex. 30). With respect to any asserted duty on the part of TWA to change plaintiff's shift in violation of the seniority provisions of the labor-management contract, the same considerations apply here as applied with respect to the union. Title VII does not force TWA to impose upon other employees because of one employee's religious belief. TWA's business includes the administration of its many employees and to impose hardships upon them imposes hardships upon the company's business. We find and conclude, therefore, that it would have been an undue hardship for TWA to have changed plaintiff's shift in violation of the seniority provision of the labor-management contract.

Finally, we again make reference to the seniority provisions of Title VII, 42 U.S.C. § 2000e-2(h), which exempts different treatment to different employees based upon a

bona fide seniority system from the other provisions of § 2000e-2. That section, as we stated in reference to the union's duty to accommodate, indicates that Congress did not intend that unions or employers be required to take actions that would impinge upon bona fide seniority systems.

For the reasons stated, we find and conclude that neither TWA nor any of the three unions violated Title VII of the Civil Rights Act of 1964 by reason of its discharge of plaintiff for his refusal to work on his Sabbath. Accordingly, it is

Ordered that the Clerk of the Court enter judgment for defendants.

DECISION OF EIGHTH CIRCUIT, DECEMBER 16, 1975

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1424

Larry G. Hardison,
Appellant,

v.

Trans World Airlines, Inc., International Ass'n of Machinists and Aero Space Workers, International Ass'n of Machinists and Aero Space Workers, District 142, and International Ass'n of Machinists and Aero Space Workers, Local 1650,
Appellees.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: December 10, 1974
Filed: December 16, 1975

Before LAY, BRIGHT and WEBSTER, Circuit Judges.

WEBSTER, Circuit Judge.

This appeal presents for our review important questions concerning the requirements of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, and the guidelines on religious discrimination promulgated thereunder,

29 C.F.R. §1605 (1974). Larry G. Hardison, a member of the Worldwide Church of God, initiated this employment discrimination case against his union and his employer following his discharge as a Trans World Airlines (TWA) stores clerk for alleged insubordination. The factual background of this litigation is not disputed, and, in summarizing the relevant details, we rely heavily upon the findings of the District Court,[1] reported in *Hardison v. Trans World Airlines*, 375 F. Supp. 877 (W.D. Mo. 1974).

Hardison's job was covered by a collective bargaining agreement negotiated with TWA by the International Association of Machinists and Aero Space Workers, The International Association of Machinists and Aero Space Workers, District 142, and the International Association of Machinists and Aero Space Workers, Local 1650, all defendants below.[2] That agreement contained seniority provisions relating, *inter alia*, to days off and vacations.

The Stores Department at the Kansas City International Airport, in which Hardison had worked from June 5, 1967 until his discharge on April 2, 1969, operates twenty-four hours per day, seven days per week. Hardison initially worked as a stores clerk in Building No. 1, performing work which was essential to TWA's operation but not unique. In the spring of 1968, Hardison began studying the teachings of the Worldwide Church of God. That religion requires its members to refrain from all work on certain designated holidays as well as on its Sabbath, which occurs each week from sundown on Friday

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1. The Honorable John W. Oliver, United States District Court for the Western District of Missouri.

2. While distinctions between the local, district, and international unions are made by appellees in this appeal, our holding makes it unnecessary to take account of such distinctions, and the unions are sometimes for convenience collectively referred to herein as "the union".

to sundown on Saturday. Hardison discussed his religious studies with Everett Kussman, the Manager of the Stores System, who notified a TWA supervisor by memo as follows:

> 1. Agreed to Steward seeking swap of days off.
>
> 2. Agreed to odd holidays (excused T.O.) *if* he works the 'Christian' holidays when requested.
>
> 3. He advises you are getting him another job—agreed *you should*. Belongs to the 'World Wide Christian Church' Garner Ted Armstrong Ambassador College Pasadena Calif.

Soon thereafter, the supervisor notified Kussman that he had been unable to make any "headway" in trying to resolve the problem. Hardison continued to work on Friday evenings and Saturdays, including some voluntary over-time work. On October 4, 1968, Hardison wrote Kussman that he had transferred to the 11:00 p.m. to 7:00 a.m. shift as a result of which he would be able to observe the Sabbath and would soon formally enter the Worldwide Church of God. He reminded Kussman of his assurance that Hardison would be excused from work on certain holidays under those circumstances. Subsequently, he furnished Kussman at his request a list of religious holidays and dates thereof.

On December 2, 1968, Hardison bid for a position as a stores clerk in another section in Building 2 in order to obtain a day shift position. Hardison indicated that his reason for transferring to the Building No. 2 section was his recent marriage: he felt day work would be more compatible with married life. Each of these stores clerk sections was governed by a separate seniority list. Thus, although Hardison had relatively high seniority in Building No. 1, he had the second lowest seniority position

in Building No. 2. As a result, his ability to select days off was considerably diminished.

In March, 1969, Bill Wyatt, the man on the bottom of the seniority list in the Building No. 2 section, went on vacation. Hardison was called to substitute for Wyatt, whose work schedule included Friday evenings and Saturdays. On March 6, 1969, Hardison met with Kussman and James Tinder, a union steward, to discuss the conflict between this schedule and Hardison's religious practices. Several possible adjustments were explored,[3] but since all required Hardison to do some work on the first Saturday, March 8, none of these adjustments were instituted. Hardison did not file a grievance concerning this unsatisfactory resolution although he knew he had a right to do so.

Hardison did not report for work on Saturday, March 8, informing the storekeeper that he had personal business to do. Hardison was likewise absent from work on the following two Saturdays, March 15 and March 22. He was then notified that a discharge hearing had been scheduled. Prior to that hearing, Hardison met with Local 1650's grievance committee. Various avenues of legal redress and defenses were discussed, and it was decided that the best approach would be a plea for leniency coupled with an effort to obtain reversal at a higher lever in the event of an adverse result. The possibility that the union might waive its seniority rules to permit Hardison to work on a different shift was not discussed. Following the meeting Hardison voluntarily changed his shift to the "twilight shift" (3:00 p.m. to 11:00 p.m.) in an effort to resolve the problem. When Hardison left work

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3. These included such possibilities as changing Hardison's shift, changing his job, or permitting him to work four days per week rather than five.

early (at sundown) on Friday, March 28, however, it became apparent that this change in schedule would not obviate future problems as Local 1650 had hoped.

The discharge hearing was held on March 31, 1969, before TWA representative J. H. Frey. Although Local 1650 argued that termination was too severe a penalty, Hardison was found guilty of insubordination and discharged on April 2, 1969. Thereafter, both Local 1650 and District 142 attempted to contact Hardison about pursuing the matter further, but upon receiving no cooperation from Hardison, they dropped the case.

Hardison filed an unlawful employment practice charge with the Equal Employment Opportunity Commission which deferred to the Missouri Commission on Human Rights. On February 10, 1972, after all administrative procedures had been exhausted, Hardison filed suit against TWA and the three unions in United States District Court pursuant to 42 U.S.C. §2000e-2.[4] He contended that all the defendants had practiced religious discrimination and, in addition, that the unions had violated their duty of fair representation. Following a trial to the court on primarily stipulated facts, judgment was entered for all defendants on the ground that each had attempted a reasonable accommodation of plaintiff's religious needs, as required by the controlling statutes and guidelines, and that undue hardships would have resulted from any greater efforts. *Hardison* v. *Trans World Airlines, supra.*

In essence, the decision below held that the valid seniority provisions of the unions' collective bargaining agreement with TWA did not permit further accommodation by any of the defendants. Hardison appeals, contending that the District Court's findings of reasonable accommodation and potential undue hardship were clearly erroneous. Separate briefs have been filed by Hardison, the unions, TWA, and by two amici curiae seeking reversal, the Equal Employment Opportunity Commission and COLPA (National Jewish Commission on Law and Public Affairs).

4. Federal jurisdiction was established below under 42 U.S.C. §2000e-5 and is not challenged on appeal.

The issues before us include the alleged unconstitutionality of Title VII and the guidelines on religious discrimination, the extent of the unions' duty of fair representation under the circumstances presented, and whether the findings below that the defendants had fulfilled their respective duties to attempt a reasonable accommodation, short of undue hardship, of Hardison's religious practices were clearly erroneous.

I

STATUTORY AND REGULATORY FRAMEWORK

Our review must necessarily begin with an examination of the controlling statutes and regulations.

The Civil Rights Act of 1964 specifically forbids employers from practicing religious discrimination in specifically enumerated ways.

42 U.S.C. §2000e-2(a) provides in part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; * * *

42 U.S.C. §2000e-2(c) provides:

It shall be unlawful employment practice for a labor organization—

(1) to exclude or expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

The EEOC is empowered to promulgate regulations in aid of the statute. 42 U.S.C. §2000e-12(a). The original guidelines provided:

> However, the Commission believes that an employer is free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday.

29 C.F.R. §1605.1(a)(3), 31 Fed. Reg. 8370 (1966). The regulations were modified in 1967 to provide:

> The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

29 C.F.R. §1605.1(b), 32 Fed. Reg. 10298 (1967). The EEOC further placed upon the employer "the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable." 29 C.F.R. §1605.1(c), 32 Fed. Reg. 10298 (1967).

The possibility that the revised regulations might impose a burden (to accommodate) not contemplated by the statute which posed "grave constitutional questions" of violation of the Establishment Clause of the First Amendment was raised in dicta in *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, 334 (6th Cir. 1970), affirmed by an equally divided Court, 402 U.S. 689 (1971). *Dewey* also concluded that Title VII only prohibited acts taken with intent to discriminate. This conclusion was rejected by the Supreme Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

In 1972, Congress incorporated the substance of 29 C.F.R. §1605.1(b) into the Act by defining "religion" as follows:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. §2000e(j).

This amendment has been held to have eliminated all doubt that the guideline at 29 C.F.R. §1605.1 reflects the will of Congress. *Reid* v. *Memphis Publishing Co.*, 468 F.2d 346, 351 (6th Cir. 1972);[5] *Riley* v. *Bendix Corp.*, 464 F.2d 1113, 1116-17 (5th Cir. 1972). The District Court likewise so held, and we agree.

TWA LIABILITY

29 C.F.R. §1605.1, which we hold to be consistent with the statute, defines the parameters of the employer's duty. The company may not accept the role of a Pontius Pilate.[6] An effort to accommodate the employee's religious observances must be made. Such accommodation need only be a reasonable one. An accommodation alternative which imposes undue hardship upon the employer's business is unreasonable and not required. The burden of demonstrating its inability to reasonably accommodate falls upon the employer.

The record reflects a consistent effort by Hardison to acquaint TWA with his religious conversion and the

5. In a second appeal, a different panel of the Sixth Circuit (Edwards, J., dissenting) seems to have receded from its prior holding that the regulation was consistent with the statute. *Reid* v. *Memphis Publishing Co.*, 521 F.2d 512 (6th Cir. 1975). We are more persuaded by the earlier opinion and by Judge Edwards' dissent.

6. Matthew 27:24.

effect of that commitment upon his ability to work during his Sabbath period and certain other religious holidays. He made no demands which were not consistent with his known religious beliefs. He was willing to work long weeks or short weeks provided his religious obligation to abstain from work on his Sabbath could be met. He even transferred to the twilight shift in order to minimize the impact of his absence on the company.

We cannot agree with the company's contention, apparently accepted by the District Court, 375 F.Supp. at 891, that Hardison's transfer from Building No. 1 to Building No. 2 was evidence of a lack of cooperation on his part. The implication is that if Hardison had not transferred he would have retained enough seniority in Building No. 1 to protect himself against Sabbath day assignments. This is not accommodation. To limit Hardison's right of transfer within the company as a condition of accommodation would be "to discriminate against [him] with respect to his * * * conditions, or privileges of employment, because of [his] * * * religion * * *." 42 U.S.C. §2000e-2(a)(1). The purpose of this transfer was to obtain a daytime shift, Hardison having recently married. While the regulation implies that the employee must be responsive to a reasonable accommodation, no such accommodation was ever offered by TWA, which at all times contended that it was precluded from accommodating Hardison's Sabbath observance by the collective bargaining agreement. Before an employer can assert the defense of non-cooperation, it is incumbent upon it to establish the accommodation which it has tendered and with which the employee refused to cooperate. *See Riley* v. *Bendix Corp.*, *supra*; *Claybaugh* v. *Pacific Northwest Bell Telephone Co.*, 355 F. Supp. 1, 4-6 (D. Ore. 1973) (Employer should have attempted a temporary accommodation in view of its large work force).

Hardison's job assignment in Building No. 2 was to pick up or deliver parts needed by mechanics working in the building. He was to "run the train", that is, to continually make the rounds of the shops in the building. He was part of a work force of 38 to 40 people, although he would be the only person running the train during his particular shift on the weekend. TWA conceded that there were over 200 available employees who were capable of performing Hardison's work.

The District Court concluded that TWA had made a reasonable effort to accommodate Hardison's religious beliefs and that the alternatives rejected by TWA would have created an undue burden on TWA's business. Upon a full review of the record, we must respectfully disagree with both conclusions.

Alternatives Rejected

(1) Within the framework of the collective bargaining agreement, TWA could have permitted Hardison to work a four-day week. Hardison was willing to do this,[7] but the company would not agree because it would be shorthanded during one shift. It conceded that a supervisor could be utilized or another worker on duty elsewhere could be transferred, but urged that this would cause some other shop function to suffer. Similar arguments have been rejected by the Equal Employment Opportunity Commission. E.E.O.C. Decision No. 70-580 (March 2, 1970), 2 FEP Cases 516, 1973 CCH EEOC Decisions ¶6120; E.E.O.C. Decision No. 70-110 (Aug. 27, 1969), 2 FEP Cases 225, 1973 CCH EEOC ¶6062.

7. Hardison was also willing to work a six-day week but this solution was in apparent violation of the 40 hour per week clause of the contract.

In determining whether a possible accommodation would result in undue hardship or mere inconvenience, we must look to the facts of each case. The burden of demonstrating undue hardship is upon the employer. In this case, the company contended that a short week for one man during the temporary period of Wyatt's vacation would have hampered its operations. Two company witnesses expressed such an opinion without any further evidence or factual support. We think the District Court erroneously drew an inference of undue hardship from such testimony. The actual hours involved in this case did not even amount to a full shift, since Hardison had transferred to the twilight shift and would have worked from 3:00 p.m. on Friday until sundown (approximately 6:30 p.m.), thus further reducing the impact upon the company's operations. Balanced against the interests to be protected by §2000e, we cannot say such an accommodation would result in an undue hardship to the employer.[8]

(2) Another alternative within the framework of the collective bargaining agreement was for TWA to fill Hardison's Sabbath shift from other available personnel. This could be accomplished by holding a worker over from

8. Cases cited by TWA are readily distinguishable. They deal with situations where the work force available to accommodate the complaining employee's needs was small, *see, e.g., Johnson* v. *United States Postal Service*, 364 F. Supp. 37 (N.D. Fla. 1973), *aff'd*, 497 F.2d 128 (5th Cir. 1974); *Drum* v. *Ware*, ... F. Supp. ....., 7 FEP Cases 269, 7 EPD ¶9244 (W.D. N.C. 1974); or where the employer presented no evidence to support its claim that it reasonably accommodated its employee's needs, *see, e.g., Riley* v. *Bendix Corp.*, 464 F.2d 1113 (5th Cir. 1972), or that it would suffer undue hardship, *see, e.g., Jackson* v. *Veri Fresh Poultry, Inc.*, 304 F. Supp. 1276 (E.D. La. 1969). Moreover, we think a totality of the circumstances approach must reject unproven assumptions that the company will be inundated with similar demands. That approach would be more persuasive at a point in time when the hardship was in fact evident and was manifestly undue. Hardison's request was the first of its kind which TWA's witnesses could recall.

the last shift, calling a worker in early, or, more logically, assigning a worker from the pool of 200 employees qualified to do the work. TWA contended that this alternative would be an undue hardship because such workers must be paid overtime compensation. The District Court said, "The duty to accommodate does not require that an employer make every effort short of going out of business to permit his employees to s[t]ay on the job and also to observe their religion", 375 F. Supp. at 889, and that "Title VII cannot be interpreted to require that companies finance employee's religious beliefs." 375 F. Supp. at 891. These general statements, while arguably correct, may tend to distort the actual hardship which overtime payments would have imposed upon TWA to fill Hardison's Sabbath shift under the facts of this case. The regulation does not preclude some cost to the employer anymore than it precludes some degree of inconvenience to effect a reasonable accommodation. *Cf. Ward* v. *Allegheny Ludlum Steel Corp.*, 397 F. Supp. 375, 377 (W.D. Pa. 1975). The regulation expressly casts upon the employer the burden of proving undue hardship upon its business. Each case must stand upon its own facts. The actual cost of accommodation by filling Hardison's Sabbath shift from available personnel is not clear from the record. We do know that in this case the cost would have ended upon Wyatt's return from his vacation.[9] The company might well have concluded that the additional expense was preferable to getting along with one less man on the shift or suffering the administrative inconvenience of seeking a swap for Hardison. It does not appear from the record, however, that TWA gave any serious consideration to the reasonableness of such an alternative or to the extent of the burden

9. It should also be obvious that neither Hardison nor his religion would have benefited financially from such an accommodation.

it might create upon the business of TWA. We cannot say that its burden of proof has been met in this case.

(3) A third alternative considered was a swap between Hardison and another employee, either for another shift or for the Sabbath days.[10] While both TWA and the union indicated no opposition to a voluntary swap, the acquiescence was clearly couched in terms of the limitations imposed by Article VI, the seniority clause of the collective bargaining agreement:

> (b) The principle of seniority shall apply in the application of this Agreement in all reductions or increases of force, preference of shift assignment, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement.

The company relied upon the union steward to handle the details. Every swap was technically at risk because the exchange was subject to the right of a senior worker to bump into the opening. Thus, the company and the union contended that they could not individually or jointly act to make a job exchange which would accommodate Hardison's religious need to be free of servile work on his Sabbath.

The proper relationship between a bona fide seniority system and the requirement of reasonable accommodation

10. TWA had earlier agreed to a "swap" on Hardison's religious holidays provided Hardison was willing to work an equal number of "Christian" holidays and another employee was willing to trade with Hardison. None of the holidays (as distinguished from Sabbath days) had fallen on Hardison's shift prior to his discharge, and we are not concerned with whether TWA's posture with respect to such religious holidays was a reasonable accommodation. We note, however, that the undertaking was to permit a swap, not to find one or obtain union approval.

under 29 C.F.R. §1605.1 has not yet been settled by the Supreme Court.[11] The Equal Employment Opportunity Commission has taken the position that when the inflexibility of a collective bargaining agreement is raised as a defense to charges of religious discrimination, that inflexibility must be justified by substantial business necessity. E.E.O.C. Decision No. 73-0314 (Aug. 31, 1972), 1973 CCH EEOC Decision ¶6379; E.E.O.C. Decision No. 72-2066 (June 22 1972), 4 FEP Cases 1063, 1973 CCH EEOC Decisions ¶6367. At least one court has directed that an article in a collective bargaining agreement which would have required an employee to work occasional Saturdays in violation of his religious beliefs not be applied to such employee. *Drum* v. *Ware*, ... F. Supp. ....., 7 FEP Cases 269, 7 EPD ¶9244 (W.D. N.C. 1974). *But see Dawson* v. *Mizell*, 325 F. Supp. 511 (E.D. Va. 1971). It would seem that a collective bargaining agreement, the seniority provisions of which preclude *any* reasonable accommodation for religious observances by employees, is prima facie evidence of union and employer culpability under the Act.[12] We are not required to reach that point in this case, however, because the evidence is clear that TWA

11. 42 U.S.C. §2000e-2(h) provides in part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply * * * different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. * * *

12. If Saturday work inevitably falls to the employees with lowest seniority, one may well ask whether such seniority provisions would not effectively preclude TWA from ever hiring those Seventh Day Adventists, Orthodox Jews, and members of the Worldwide Church of God whose religious convictions preclude work from sundown on Friday until sundown on Saturday. It is no answer to such a person, or to the statute itself, that if he compromises his religious beliefs for a time he may develop enough seniority to practice them again.

did not seek and the union therefore did not refuse to entertain a possible variance.[13]

TWA did not even seek to find volunteers within the seniority system. It left that task to the union steward, who likewise did nothing. The matter was not referred to the Union Relief Committee, an informal organization of union members through which the union and TWA were normally able to avoid confrontations over seniority variances in special situations. This was the first Sabbath request which TWA and the union had received at the Kansas City operation. While company officials testified of their concern that giving Hardison a variance would irritate other union members, we find no evidence to support such an inference, nor are we convinced that such irritation, if real, would have been an undue hardship on the employer's business. *See Cummins* v. *Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975). *See generally*, Annot., 22 A.L.R. Fed. 580 (1975).

III

UNION LIABILITY

The District Court rejected the union's contention that the duty of accommodation falls only upon the employer and not upon the union. Judge Oliver observed:

13. In *Shaffield* v. *Northrop Worldwide Aircraft Services, Inc.*, 373 F. Supp. 937 (M.D. Ala. 1974), a collective bargaining agreement which contained a seniority provision also contained a provision that "seniority cannot be the sole determining factor in making shift assignments." The court held that failure of the employer to seek a variance to permit the employee, a Seventh Day Adventist, to transfer to a position which would avoid his working on his Sabbath was a violation of Title VII. *But see Kettell* v. *Johnson & Johnson*, 337 F. Supp. 892 (E.D. Ark. 1972), decided prior to the 1972 Amendment to Title VII which makes clear that failure to make affirmative accommodation must be justified by the employer.

> The language of the regulation does speak in terms of the employer but so have other provisions and regulations pursuant to the Act, which have been interpreted to include the union. For example, 42 U.S.C. §2000e-2(h), the provision on seniority systems discussed below has been applied to unions. See, e.g., Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969).
>
> Furthermore, this case is a perfect example of a situation in which a union could accommodate a member if required to do so. TWA agreed that plaintiff could change shifts if the union approved. Such approval would mean that the union would have to suspend the operation of the seniority rules in plaintiff's case. Had the union made this accommodation, plaintiff would have been able to observe his Sabbath as he wished.

375 F. Supp. at 882. We agreed with Judge Oliver's analysis and conclusion that in a proper case a union may be held to a duty of reasonable accommodation as well as the employer. This conclusion is consistent with the provisions of 42 U.S.C. §2000e-2(c), which declare it to be an unlawful employment practice for a union "to cause or attempt to cause an employer to discriminate against an individual in violation of this section." Thus, the union may be held liable if it purposefully acts or refuses to act in a manner which prevents or obstructs a reasonable accommodation by the employer so as to cause the employer to discriminate.

The District Court next considered the union's duty in light of its existing contract. Finding the seniority provisions of the contract to be facially neutral, the District Court held it to be "coincidental" that as to Hardison

"the seniority system acted to compound his problems in exercising his religion." 375 F. Supp. at 883. The District Court further found that the union's duty to accommodate in this case "did not require the union to ignore its seniority system" and that the efforts of the union in behalf of Hardison did not violate its duty of fair representation. 375 F. Supp. at 883-85.

The conclusions are not directly challenged upon appeal, the briefs and oral argument are directed to the breach of duty by TWA. We are thus not required to to reach the substantive correctness of such conclusions. *Twin City Federal Savings & Loan Association* v. *Transamerica Insurance Co.*, 491 F.2d 1122, 1127 (8th Cir. 1974); *Mississippi River Corp.* v. *Federal Trade Commission*, 454 F.2d 1083, 1093 (8th Cir. 1972). We reserve for future cases the effect of a union's refusal to modify its employee seniority rights when no other accommodation can be accomplished without undue hardship to the employer's business. *See Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *petition for cert. dismissed*, 404 U.S. 1006 (1971).[14] At this point, no hard rules seem possible; the balancing of important competing interests must be done on a case by case basis.

---

14. In *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir.), *petition for cert. dismissed*, 404 U.S. 1006 (1971), the Fourth Circuit held:

> Avoidance of union pressure also fails to constitute a legitimate business purpose which can override the adverse racial impact of an otherwise unlawful employment practice. The rights assured by Title VII are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert. Title VII requires that both union and employer represent and protect the best interest of minority employees. Despite the fact that a strike over a contract provision may impose economic costs, if a discriminatory contract provision is acceded to the bargainee as well as the bargainor will be held liable. [footnote omitted]

IV

CONSTITUTIONAL CLAIM

Since we conclude that TWA violated its duty of accommodation, we must reach its constitutional claim that Title VII violates the Establishment Clause of the First Amendment by requiring an accommodation. TWA contends that the statute is not neutral as between groups of religious believers and nonbelievers. *See School District of Abington Township* v. *Schempp,* 374 U.S. 203 (1963); *Everson* v. *Board of Education,* 330 U.S. 1 (1947). The view that it is constitutionally impermissible for a government to enforce accommodation of religious beliefs in a manner which results in privileges not available to a nonbeliever, or which result in inconvenience to the nonbeliever, is not without articulate support. *See* Edwards and Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII,* 69 Mich. L. Rev. 599, 628 (1971). *But see* Comment, *Religious Observance and Discrimination in Employment,* 22 Syracuse L. Rev. 1019 (1971).

The District Court, however, found this constitutional attack upon the statute and guidelines to be without merit. It first applied the three-fold test set forth in *Committee for Public Education & Religious Liberty* v. *Nyquist,* 413 U.S. 756, 772-73 (1973): (1) the law must reflect a clearly secular purpose; (2) it must have a primary effect that neither advances nor inhibits religion; and (3) it must avoid excessive government entanglement with religion. The District Court stated:

> The duty to accommodate, as stated in 42 U.S.C. §2000e(j), reflects the general secular legislative purpose of guaranteeing an employee that he will not be discharged from his job merely because of his religion. Consistent therewith, the regulation also imposes a duty to accommodate. The incidental effect of the regulation perhaps indirectly aids religion but its primary effect is to guarantee job security. The purpose and effect of the law as interpreted by the regulation is not primarily to aid religion but to prevent employers from devising means to discriminate which are not facially discriminatory but which do discriminate in effect and intent.
>
> Finally, the regulation does not involve excessive government entanglement with religion. The regulation simply requires the employer to make affirmative efforts to accommodate the employee's religion. No further involvement is necessary than a judgment by the E.E.O.C. or the court that no such accommodation was made. That is not the kind of entanglement contemplated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), and Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971).

375 F. Supp. at 888.

The same constitutional argument was recently raised in *Cummins* v. *Parker Seal Co., supra,* and similarly rejected. The Sixth Circuit held that both the statute and the regulation met the three-fold test of *Nyquist.* The purpose of the statute, it observed, was "to prevent discrimination in employment." *Id.* at 552. This purpose, it noted, was upheld against constitutional challenge in *Griggs* v. *Duke Power Co., supra,* which dealt with racial discrimination. It found further support in the reasoning of the Supreme Court in *Gillette* v. *United States,* 401 U.S. 437 (1971), wherein draft exemptions for conscientious objectors were upheld, not only upon pragmatic grounds but also because a valid state interest lay in the promotion

of conscientious action thought to be important in a democratic society. The Sixth Circuit noted that neither the statute nor the regulation advanced religion; no financial support was mandated for religious institutions. *See Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971); *Walz* v. *Tax Commission*, 397 U.S. 664, 668 (1970). Finally, it noted that the mere requirement of reasonable accommodation involved far less government entanglement with religion than the Sunday closing laws sanctioned by *McGowan* v. *Maryland*, 366 U.S. 420 (1961). We find this reasoning persuasive, and we agree with the District Court's conclusion that the constitutional challenge must be rejected.

V

CONCLUSION

We affirm the entry of judgment in favor of defendant unions. Since we hold that TWA engaged in religious discrimination by breach of its duty to make a reasonable accommodation to the religious needs of Hardison through affirmative action, we reverse the judgment in favor of TWA and remand the case to the District Court for a determination of appropriate relief under 42 U.S.C. §§2000e-5(g) and 2000e-5(k).

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUL 1 1976

In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1126

TRANS WORLD AIRLINES, INC.,
Petitioner,

vs.

LARRY G. HARDISON, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 142, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 1650,
Respondents.

and

No. 75-1385

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 142, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 1650,
Petitioners,

vs.

LARRY G. HARDISON and TRANS WORLD AIRLINES, INC.,
Respondents.

CONSOLIDATED BRIEF FOR RESPONDENT LARRY G. HARDISON IN OPPOSITION

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Respondents.

CONSOLIDATED BRIEF FOR RESPONDENT LARRY G. HARDISON IN OPPOSITION

TO: The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

The opinion of the Court of Appeals is unreported except in 44 U.S.L.W. 2295 (8th Cir., December 16, 1975). The judgment and opinion of the District Court is reported at 375 F.Supp. 877 (W.D. Mo. 1974).

JURISDICTION

The opinion of the Court of Appeals was entered on December 16, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The establishment clause of the First Amendment of the United States Constitution provides: "Congress shall make no law respecting an establishment of religion. . . ."

Section 701(j) of the Civil Rights Act of 1964, as amended, provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. 42 U.S.C. §2000e(j) (1974).

Section 703(a)(1) of the Civil Rights Act of 1964, as amended, provides in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to . . . discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . religion. . . . 42 U.S.C. §2000e-2(a)(1) (1974).

Section 703(h) of the Civil Rights Act of 1964, as amended, provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply * * * different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin. * * * 42 U.S.C. §2000e-2(h) (1974).

The Guidelines of the Equal Employment Opportunity Commission with respect to religious discrimination, 29 C.F.R. §1605.1, provide in pertinent part as follows:

* * *

> (b) The Commission believes that . . . section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees . . . where such accommodation can be made without undue hardship on the conduct of the employer's business.

(c) . . . [T]he employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

STATEMENT OF THE CASE

The facts which are pertinent to this Court's consideration are set forth in detail in the District Court's opinion (Petitioner Unions' Appendix B; Petitioner Trans World Airlines, Inc.'s Appendix A; and the opinion of the United States Court of Appeals for the Eighth Circuit appearing as Appendix B in Petitioner Trans World Airlines, Inc.'s Petition in this cause). For the purposes of considering whether a Writ of Certiorari should be granted in this cause and for the convenience of this Court Respondent Hardison adopts a Statement of the Case as set forth by the Petitioners and by the District Court and the Appellate Court.

QUESTIONS PRESENTED

I. Should this Court grant a Writ of Certiorari when an employer who had the duty of participating in a "reasonable accommodation" to an employee's religious beliefs had not even attempted such an accommodation and therefore any alleged interference with the seniority rights of other employees would be purely speculative and conjectural and the problem does not in fact exist.

II. Should this Court grant a Writ of Certiorari to determine whether the Statute and guideline regarding religious discrimination in employment violates the Establishment Clause of the First Amendment to the Constitution of the United States of America when this Court has already granted a Writ on that exact same question.

REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED TO EITHER PETITIONER

I

The question of whether "reasonable accommodation" requires the employer or union to breach the collective bargaining agreement or disregard seniority rights should not be considered as a reason for granting a Writ of Certiorari in this case because a "reasonable accommodation" of Respondent Hardison's religious beliefs which was possible by Respondent Trans World Airlines, Inc., yet not even attempted, would not have interfered with the seniority rights of other employees.

Both the Petitioner Unions and Petitioner Trans World Airlines, Inc., have argued to this Court that accommodation of Hardison's religious beliefs, and the effect of the decision of the Court of Appeals for the Eighth Circuit which is the subject of this Writ of Certiorari, would necessitate "bumping" employees with more seniority than Respondent Hardison. This representation is simply incorrect. The Court of Appeals for the Eighth Circuit expressly found that such a conflict could have been easily avoided by Trans World Airlines, Inc., and therefore did not have before it the question of the lack of availability of an accommodation so as to cause the employer to unavoidably conflict with the seniority provisions of the collective bargaining agreement. In fact, the Court found that the employer had several ways in which it could have accommodated Hardison's religious beliefs and still, in manifesting those accommodations, be *within* the framework of the seniority system of the collective bargaining agreement in question.

The Court of Appeals stated:

Alternatives Rejected

"(1) Within the framework of the collective bargaining agreement, TWA could have permitted Hardison to work a four-day week. Hardison was willing to do this, but the company would not agree because it would be short-handed during one shift. It conceded that a supervisor could be utilized or another worker on duty elsewhere could be transferred, but urged that this would cause some other shop function to suffer.

. . . The actual hours involved in this case did not even amount to a full shift, since Hardison had transferred to the twilight shift and would have worked from 3:00 p.m. on Friday until sundown (approximately 6:30 p.m.), thus further reducing the impact upon the company's operations.

(2) Another alternative within the framework of the collective bargaining agreement was for TWA to fill Hardison's Sabbath shift from other available personnel. This could be accomplished by holding a worker over from the last shift, calling a worker in early, or, more logically, assigning a worker from the pool of 200 employees qualified to do the work. TWA contended that this alternative would be an undue hardship because such workers must be paid overtime compensation. (A39 and A40 of Petitioner Trans World Airline, Inc.'s Appendix)

Thus, the Court found that the employer failed to pursue alternatives which were not in violation of the collective bargaining agreement and which were available. These alternatives cited above from the

Eighth Circuit Court of Appeals opinion did not require a deviation from the collective bargaining agreement. Petitioner Trans World Airlines, Inc., and Petitioner Unions would have this Court review the United States Court of Appeals for the Eighth Circuit's decision on a cause which they say is of national public interest and importance, yet never occurred. Thus, it is suggested by the Respondent Hardison that the decision of the Court of Appeals for the Eighth Circuit did not necessitate the Petitioner Trans World Airlines, Inc.'s breaching the collective bargaining agreement and therefore did not necessitate or cause any infringement of fellow employees' seniority rights who belonged to Petitioner Unions as did Respondent Hardison.

Further, the alternatives mentioned by the Court of Appeals, did *not* deviate from the collective bargaining agreement. While the Court noted that a "swap" might have been one manner in which Hardison's religious beliefs could have been accommodated, it was never established in this case that such a "swap" would have infringed upon another employee's seniority rights. As noted by the Court of Appeals, it may well have been that another employee might have volunteered to take Hardison's Sabbath shift. Yet this alternative was never pursued by the company in this case. Also, even though a special Union Relief Committee existed for the purpose of resolving problems over seniority variances for special situations, Hardison's problem was never even referred to that Committee.

With regard to the collective bargaining agreement the Court of Appeals concluded:

"It would seem that a collective bargaining agreement, the seniority provisions of which preclude

any reasonable accommodation for religious observances by employees, is prima facie evidence of union and employer culpability under the Act. We are not required to reach that point in this case, however, because the evidence is clear that TWA did not seek and the union therefore did not refuse to entertain a possible variance (emphasis added)." (Appendix of Petitioner Trans World Airlines, Inc., A43-A44)

Respondent Hardison therefore respectfully suggests to this Court that this is not a proper case to review because of the reason that there is not a conflict between an existing collective bargaining agreement and attempts by an employer to attempt or perform a reasonable accommodation to an employee's religious belief for the reason that no such attempt on the part of TWA ever occurred. There is no factual basis for the reason that the interpretation of the statute would result in innumerable recurrent nationwide problems in the administration of uniform work rules in collective bargaining agreements because that question was not decided by the Court of Appeals.

This Court's recent review of a case involving questions of seniority rights has offered sufficient guidance to unions and employers for the purpose of ascertaining what steps may be taken to reasonably accommodate an employee's religious beliefs within the duties imposed on the employer by Title VII.

In the case of *Franks* v. *Bowman Transportation Company, Inc.*, 495 F.2d 398, ... U.S. ...., No. 74-728, 12 FEP Cases 459 (1976), this Court recently addressed itself to questions of awarding seniority rights and back pay to properly make victims of discrimination whole. It is respectfully suggested that the

Court's reasoning in *Franks*, supra, should apply to an employer's compliance with the provisions of Title VII which pertain to religious discrimination in the employer-employee context where a collective bargaining agreement is present. In fact, the holdings of this Court in *Franks*, supra, answer the questions raised by Petitioner Unions and Petitioner Trans World Airlines, Inc., in their Petitions filed in this case. This Court stated in *Franks:*

> "Second and more fundamentally, it is apparent that denial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central 'make whole' objective of Title VII. These conflicting interests of other employees will of course always be present in instances where some scarce employment benefit is distributed among employees on the basis of their status in the seniority hierarchy. But as we have said, there is nothing in the language of Title VII, or in its legislative history, to show that Congress intended generally to bar this form of relief to victims of illegal discrimination, . . .
>
> Accordingly, we find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected. 'If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed. *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2nd Cir. 1971).' "

As this Court well recognized in *Franks*, supra, there will always be certain employee benefits which will be cherished and sought after. Certainly it could be conceded that "Saturdays off" is one of these benefits. Yet this benefit must yield, as must seniority, to the Congressional mandate imposed by Title VII, that employers not discriminate in employment on the basis of religion. Since this mandate includes the requirement that an employer and union must make reasonable accommodation of an employee's religious beliefs, then to the extent that those attempts at reasonable accommodation by an employer conflict with provisions of a collective bargaining agreement, those provisions must not prevail. The law must be paramount over any contract. Collective bargaining agreements have never been above federal law and it is suggested that the argument by Petitioner Trans World Airlines, Inc., and Petitioner Unions, that even without TWA attempting a reasonable accommodation a problem with the seniority agreement might arise is entirely conjectural. Such an argument attempts to place their agreement above the public policy enunciated by Title VII.

Further, even though the seniority provisions of an employer's collective bargaining agreement may not amount to "intentional" discrimination, the agreement is nonetheless subject to the requirements of Title VII. It is quite clear from previous decisions of this Court that no intentional discrimination need be shown but only the consequences of a discriminatory practice need be pointed out and hopefully remedied. The lack of intent to discriminate on the basis of religion does not absolve Petitioner Trans World Airlines, Inc., in this case nor does their excuse that Petitioner Unions would cause them difficulty relieve them from the duty to

participate in a reasonable accommodation. Nor does the recognition by the United States Court of Appeals for the Eighth Circuit of the discriminatory effect of the Unions' position in this case relieve the Petitioner Unions from allowing a reasonable accommodation even though it may conflict in part with their collective bargaining agreement.

Therefore, it is respectfully submitted to this Court that the argument of Petitioner Trans World Airlines, Inc., and Petitioner Unions presents nothing for review by this Court that has not already been enunciated by this Court and no guidance is necessary after the clear pronouncement which has been made regarding federal law taking precedence over collective bargaining agreements.

II

The statute and guideline do not violate the establishment clause of the First Amendment and even though that question has not been squarely decided by this Court that question has been preserved by the granting of a Writ of Certiorari presently before this Court.

This Court on March 20, 1976, granted a Writ of Certiorari to the Sixth Circuit Court of Appeals in the case of *Parker Seal Co.* v. *Paul Cummins*, No. 75-478, Certiorari granted .... U.S. ...., 44 L.W. 3493. It is respectfully submitted to this Court that a consideration by the Court in that case as to whether the statute and the guideline dealing with religious discrimination does or does not violate the establishment clause is sufficient to preserve the same argument by the Petitioners in this cause. It is Respondent Hardison's position that there need not be a duplication of

this Court's time in deciding the same questions. Therefore, although Petitioner Hardison takes the position that the statute and guideline question meet the three-part test set forth in *Committee for Public Education and Religious Education and Religious Liberty* v. *Nyquist*, 413 U.S. 757 (1973), it is sufficient to state that Petitioner Hardison's position regarding the claim of unconstitutionality is that Petitioners' claim is presently before the Court in the *Parker* case and should not be a reason for granting the Writ in this cause.

CONCLUSION

There is no reason to grant the Writ of Certiorari in this cause because there has never been a conflict actually presented in this case between the Petitioner Unions' collective bargaining agreement and the activity of Petitioner Trans World Airlines, Inc. Therefore their arguments are conjectural and have no basis in fact and should not support the granting of a Writ. Further, as to the constitutional claim, that issue is presently pending before the Court and no duplication is necessary. Both Petitioners have failed to establish any factual or sufficiently proper and important reasons why the Writ should be granted. For the reasons stated Respondent Hardison submits that a Petition for Writ of Certiorari on behalf of Petitioner Trans World Airlines, Inc., and Petitioner Unions should be denied.

Respectfully submitted,

WILLIAM H. PICKETT

Supreme Court, U. S.
FILED
JUL 8 1976
MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1126

TRANS WORLD AIRLINES, INC.,
Petitioner,

vs.

LARRY G. HARDISON, ET AL.,
Respondents.

REPLY OF PETITIONER TO CONSOLIDATED BRIEF IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1126

TRANS WORLD AIRLINES, INC.,
Petitioner,
vs.
LARRY G. HARDISON, ET AL.,
Respondents.

REPLY OF PETITIONER TO CONSOLIDATED BRIEF IN OPPOSITION

Petitioner, Trans World Airlines, Inc. ("TWA") has received a consolidated brief in opposition to its petition for a writ of certiorari submitted by Respondent, Larry G. Hardison ("Hardison").[1]

QUESTIONS PRESENTED

Hardison accepted TWA's statement of facts (Brief in Opposition, p. 4). Given that factual statement, no viable question could be raised concerning TWA's efforts

1. Other respondents to this petition include the International Association of Machinists and Aerospace Workers, International Association of Machinists and Aerospace Workers, District 142, and International Association of Machinists and Aerospace Workers, Local 1650 (hereinafter collectively referred to as the "union" or "unions"), who filed a companion petition for a writ of certiorari, No. 75-1385. Hardison's consolidated brief in opposition was directed at both TWA's and the union's petitions.

to accommodate Hardison. The statement of facts demonstrates that TWA had no intent to discriminate against either Hardison or his religion. Accordingly, TWA respectfully reiterates that the pertinent questions are those stated on pages 2 and 3 of its petition.

The Court's grant of certiorari in *Parker Seal Co.* v. *Cummins*, 516 F.2d 544 (6th Cir. 1975), No. 75-478, *cert. granted* ..... U.S. ....., 44 U.S.L.W. 3493, March 1, 1976, evidences the importance of the questions presented by this petition. However, contrary to Hardison's brief in opposition, the grant of certiorari in *Parker Seal* does not render this petition less meritorious. Indeed, the grant of certiorari in this case would present the Court a more comprehensive and complete factual context for deciding the vital constitutional and legal questions concerning accommodation of religious beliefs.

REPLY ARGUMENT

I. This Petition Supplements Parker Seal Co. v. Cummins Thereby Presenting the Court a More Comprehensive and Complete Factual Basis for Deciding the Important Questions Presented.

Hardison concedes, as he must, the nationwide importance of the questions presented by the petition. He asserts, however, that the Court's grant of certiorari in *Parker Seal Co.* v. *Paul Cummins*, 516 F.2d 544 (6th Cir. 1975), No. 75-478, *cert. granted* ..... U.S. ....., 44 U.S.L.W. 3493, March 1, 1976, preserves TWA's constitutional argument so that, "there need not be a duplication of this Court's time in deciding the same question," (Brief in Opposition, pp. 11-12).

TWA respectfully submits that, contrary to Hardison's suggestion, the granting of certiorari in this case in addition to *Parker Seal* would present the constitutional issues to the Court in a more comprehensive and complete factual setting than an argument based solely on *Parker Seal's* facts.

Not only is the constitutional question of nationwide importance, but also because of the substantial impact the accommodation requirement has on collective bargaining agreements negotiated pursuant to important federal statutory schemes such as the Railway Labor Act (45 U.S.C. 151 et seq.) and the National Labor Relations Act (29 U.S.C. 151 et seq.), it is important that the Court review the standard established by the court below for determining whether an employer can reasonably accommodate the diverse religious practices of its various employees. Because *Parker Seal* does not present a factual setting involving the proper relationship of religious accommodation to such other important federal legislation, this case enables the Court to consider what that proper relationship ought to be in the context of a nondiscriminatory seniority system which does not lock-in the effects of past discriminatory conduct. Illustratively, because the court of appeals decision, as recognized by Hardison (Brief in Opposition, p. 10), establishes a discrimination by effect standard, it is important for this Court to determine whether that standard is appropriate in the religious discrimination area of Title VII given the applicability of the First Amendment and the existence of large industrial labor forces that are governed by seniority systems and other uniform work rules which, in the language of 203(h) of Title VII, 2 U.S.C. § 2000e-2(h), ". . . are not the result of an intention to discriminate because [of] . . . religion." See generally Ed-

wards and Kaplan, *Discrimination and the Rule of Arbitration Under Title VII,* 69 Mich.L.Rev. 599 (1971).

Unlike the Parker Seal Company, TWA is required, without union consent, to ignore an admittedly nondiscriminatory seniority system even though Hardison voluntarily transferred, to suit his own convenience, from a job assignment where he could observe his religious practices to one where he knew he would not have sufficient seniority to do so. Hardison thus used the seniority system to bump into a desired job position. Then, solely because of his religion, he, in effect, used the power of the state to compel TWA to grant him extraordinary employee rights to the detriment of other more senior employees. Thus, the question of the appropriate role of individual compromise is squarely presented by this petition.

To follow the court of appeals decision, the large industrial employer would undoubtedly have to discriminate against employees with differing or no religious views. In granting such preferential treatment, the employer would run afoul of the thrust of *McDonald* v. *Santa Fe Transportation Company, et al.*, 44 U.S.L.W. 5067 (June 25, 1976) that all discrimination in employment is a matter of national concern. Thus, far from enhancing less discrimination in employment, the court of appeals' decision not only creates more discrimination but also raises inevitable questions concerning which religion must be preferred. For this important reason, review of this petition is essential.

Another factual reason requiring the grant of certiorari is that, in sharp contrast to many religious discrimination cases under Title VII, TWA made every effort to accommodate Hardison's religious beliefs. Indeed, the district court not only was "impressed with the men who were on the line handling the problem" (Petition, Appendix D, p.

A64), but it also found that, "it would have been an undue hardship for TWA to have changed plaintiff's shift in violation of the seniority provision of the labor-management contract" (Petition, Appendix A, p. A27).[2]

The court of appeals' decision, as contrasted to *Parker Seal,* renders it virtually impossible for a large employer to establish that it could not reasonably accommodate the various religious practices of its many employees. Similarly, the court of appeals' decision requires an employer to incur the added expense of overtime wages or to do without coverage in other work areas. Thus, under the court of appeals' decision, the state is clearly requiring a private employer to incur added expense solely because of an employee's religious beliefs. This additional factual background ought to be before the Court in the determination of such important constitutional and legislative questions.

The records in both *Parker Seal* and this case are not voluminous. There would be little, if any, duplicative efforts required by the Court in a review of both cases. On the other hand, the benefit of having a more comprehensive and complete factual background would be substantial. Further, Supreme Court Rule 43(5) provides that two or more cases, involving the same question, may, on the Court's own motion or by special permission be argued together.

---

2. The court of appeals, while stating that it relied heavily upon the findings of the district court, paradoxically held only against TWA even though TWA consented to an alteration of the seniority system. Moreover, it was TWA that initiated meetings with both Hardison and the Union in the effort to obtain a second accommodation after Hardison made his voluntary shift transfer (Tr. App. 268).

II. Replying to Respondent's Point 1, the Court of Appeals' Decision Requires an Employer to Breach, Without Union Consent, a Nondiscriminatory Collective Bargaining Agreement Which Did Not Lock in Past Discriminatory Conduct Thereby Creating Nationwide Problems in the Administration of Uniform Work Rules.

The court of appeals asserted that TWA could have (i) assigned a supervisor or another worker on duty elsewhere to replace Hardison on his Sabbath giving him a four-day work week; (ii) held a worker over from the last shift or assigned a worker from other work areas, or (iii) arranged and permitted a swap. In contrast, the district court explicitly rejected the first two because, "Both of those solutions would have created an undue burden on the conduct of TWA's business. Title VII cannot be interpreted to require that companies finance employees' religious beliefs." (Petition, Appendix A, p. A27). With respect to the latter possibility, the district court found, ". . . this case is a perfect example of a situation in which *a union* could accommodate a member if required to do so. *TWA agreed* that plaintiff could change shifts if the union approved" (Petition, Appendix A, p. 7, emphasis added). The court of appeals did recognize that its final alternative would create a conflict with the nondiscriminatory seniority system by declaring that "[i]t would seem that a collective bargaining agreement, the seniority provisions of which preclude *any* reasonable accommodation for religious observances . . . is prima facie evidence of union and employer culpability. . . ." (Petition, Appendix B, p. A43).

The approach of the court of appeals thus requires employers to ignore, abridge or breach the bona fide collective bargaining rights of other employees. Union employees across the nation have been dispossessed of uniform work rules because employers must now discriminate in favor of Sabbatarians or other religious sects, who might oppose many uniform work rules including, for example, the payment of union dues. *Cf. Yott* v. *North American Rockwell,* 501 F.2d 398 (9th Cir. 1974). That the foundation of important federal labor regulatory schemes has been severely disrupted by the decision below is illustrated by the petition for certiorari filed by the respondent Unions despite the court of appeals freeing them of liability.

Ironically, Hardison as much as concedes that the problem of tampering with the seniority rights of other employees effectively shackled TWA from further accommodation efforts by his assertion that *Franks* v. *Bowman Transportation Co.,* 44 U.S.L.W. 4356 (March 23, 1976) decided the issue of whether the duty of accommodation was affected by a seniority system. Contrary to Hardison's assertion, *Franks* is not controlling because it dealt only with the "making whole" of employees who suffered the effects of a pattern of past racial discrimination. *Franks* did not, of course, concern a bona fide seniority system that admittedly and by court finding was nondiscriminatory toward any religion and one that did not lock in the effects of past discrimination. Further, *Franks* was not at all concerned with the applicability of the First Amendment. A religious discrimination case must be governed by standards far different from those set forth in *Franks.* See generally *Can the Government Require Accommodation of Religion at the Private Job Site,* 62 Va.L.Rev. 237 (1976)[3] and Edwards and Kaplan, *supra.*

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3. This recent development article criticizes the decisions of the courts of appeal in both *Parker Seal* and *Hardison.* The author concludes that the accommodation requirement finds, "little justification in establishment clause jurisprudence . . . [n]or is the accommodation supported by an overriding secular government interest. Not even historical practice supports the rule. Consequently, it breaches the governmental neutrality on questions of religion required by the first amendment." *Id.* at 257. See also n. 130 at 257-258.

CONCLUSION

TWA respectfully submits that this petition for certiorari should be granted, and a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER TRANS WORLD AIRLINES, INC.

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BRIEF FOR PETITIONER TRANS WORLD AIRLINES, INC.

OPINIONS BELOW

The opinion of the court of appeals (A. 246)[1] is reported at 527 F.2d 33. The opinion of the district court (A. 218) is reported at 375 F. Supp. 877.

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1. Reference to "A. ....." is to the Appendix filed in this Court. References to "Pet. ....." are to the petition for certiorari filed herein on February 9, 1976. Reference to "R. ....." is to the original record transcript in the trial court. Reference to "Tr. App. ....." is to the transcript appendix filed in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered December 16, 1975 (A. 246). A timely petition for a writ of certiorari was filed February 9, 1976. This Court granted the writ of certiorari on November 15, 1976 (A. 4). Jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES AND GUIDELINE INVOLVED

The Establishment Clause of the First Amendment to the Constitution of the United States provides: "Congress shall make no law respecting an establishment of religion. . . ."

Section 703(a)(1) of the Civil Rights Act of 1964, as amended, provides:

> "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ." 42 U.S.C. § 2000e-2(a)(1) (1974).

Section 701(j) of the Civil Rights Act of 1964, as amended, provides:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (1974).

Section 703(h) of the Civil Rights Act of 1964, as amended, provides:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply * * * different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin. * * *" 42 U.S.C. § 2000e-2(h) (1974).

Guideline 1605.1 of the United States Equal Employment Opportunity Commission ("EEOC") provides:

> "(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.
>
> (b) The Commission believes that the duty not to discriminate on religious grounds required by Section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.
>
> (c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or

applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people." 29 C.F.R. § 1605.1 (1975).

QUESTIONS PRESENTED

(1) Whether the 1964 Civil Rights Act's "Reasonable Accommodation—Undue Hardship" requirement violates the Establishment Clause of the First Amendment by requiring an employer to grant preferential treatment to an employee solely because of his religious practices by (a) depriving, without union consent, more senior employees (who may or may not have any religious beliefs) of their seniority rights under a bona fide collective bargaining agreement that did not lock in any past discrimination and which was completely nondiscriminatory against any religion; or (b) financing an employee's religious observances through payment of overtime wages to a replacement or depriving other work areas of coverage?

(2) Whether the court of appeals improperly precluded an employer with a large labor force from demonstrating an inability to reasonably accommodate without undue hardship the diverse religious practices of its employees?

(3) Whether the court of appeals failed to follow Rule 52(a) of the Federal Rules of Civil Procedure in holding the district court's findings clearly erroneous and in effect trying the matter *de novo*?

STATEMENT OF THE CASE

TWA's Business

Petitioner, Trans World Airlines, Inc. ("TWA"), has been engaged in the transportation of persons, property and mail by air since its organization in 1930. During that time, TWA has operated a transcontinental system in the United States providing an around-the-world air transportation service (A. 56-57). As a common carrier engaged in air service, TWA operates pursuant to authority granted by the Civil Aeronautics Board. That authorization requires the rendition of a safe, efficient and adequate public service in the public interest. To meet its obligations, TWA conducts operations on a twenty-four hour, seven-day-a-week basis (A. 23).

In 1969, TWA had approximately 42,500 employees (including approximately 2,500 working at the John F. Kennedy Space Center), of whom about eight percent were based outside the United States (A. 59).

Labor relations of air carriers, like TWA, are subject to Title II of the Railway Labor Act, as amended, 45 U.S.C. § 151 *et seq.*, which contains provisions giving employees the right to organize and bargain collectively through representatives of their own choosing and imposes on air carriers and their employees the duty to use every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle by negotiation all disputes arising between them (A. 59). Approximately fifty-three percent of TWA's employees were covered by collective bargaining agreements with labor unions in 1969, including approximately 15,000 employees covered under a contract with the International Association of Machinists and Aero Space Workers (here-

inafter referred to as "IAM" or in the collective sense as the "union", representing the local, district and international levels, each of which was a defendant in the district court) (A. 59).

TWA's principal maintenance and overhaul base ("overhaul base") is located at Kansas City International Airport, Kansas City, Missouri. The overhaul base includes Building No. 1, which is used for the overhaul of air frames and Building No. 2, which is used for the overhaul of aircraft engines. All of TWA's air frame overhaul work, as well as the overhaul and major maintenance of aircraft engines and aircraft components, is accomplished at the overhaul base (A. 59). It is the only overhaul base and the main repair station for TWA's entire system (A. 148-149).

TWA's seven-day-a-week operation depends upon support from a number of departments at the overhaul base, including the Stores Department. The work of the Stores Department includes the delivering of parts and materials to mechanics at the overhaul base for the purpose of repairing, maintaining and overhauling aircraft and engines both for TWA's own fleet and for other airlines (A. 23, 149-150). To insure that aircraft and equipment are available so that flights are not delayed or passengers cancelled off of a flight (A. 149), the activities in the overhaul base, and Stores Department, require a twenty-four-hour-a-day, seven-days-a-week, three shifts per day schedule every day of the year (A. 23, 24, 102, 116, 149-150). The Stores Department also has the obligation to supply airline needs in case of an emergency (A. 116). In the event of an employee's job not being filled, the work of the Stores Department is so important that another employee must stay on past his shift, come in early, or a supervisor must cover, even though other work areas may suffer (A. 125, 142-143).

Hardison's Employment With TWA; Union Membership and a Bona Fide Nondiscriminatory Seniority System Under the Applicable Collective Bargaining Agreement

Respondent, Larry G. Hardison ("Hardison") was hired by TWA on June 5, 1967, as a Stores Clerk in Building No. 1 at the Kansas City overhaul base (A. 23, 66, 101). He indicated on his application for employment that he was willing to work shifts, including weekends (A. 22, 23, 25).

Hardison's employment relationship with TWA was governed by a TWA-IAM collective bargaining agreement made pursuant to the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (A. 24). At the time Hardison was employed by TWA and at all relevant times, the TWA-IAM agreement contained a seniority provision providing, in part, that:

> "The principle of seniority shall apply in the application of this Agreement in all reductions or increases of force, preference of shift assignment, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement.
>
> * * *
>
> Except as hereafter provided in this paragraph, seniority shall apply in selection of shifts and days off within a classification within a department. . . ." (A. 214-217).

When Hardison was employed, he received a copy of the TWA-IAM Agreement, a copy of the International Union's Constitution and a copy of District 142's and Local 1650's By-Laws. He read all of the documents (A. 24, 78).

Under the seniority system, TWA cannot require a senior employee to work in place of a junior employee (A.

105, 137-143). There are no circumstances under which job trades disregard seniority as a matter of practice (A. 139).

The union steward fills all "bid-ins" or "bid-outs" of job vacancies (A. 127), maintains the seniority list and refers to it in determining what employees, according to seniority, fill jobs (A. 106, 127, 138, 158). Surveys of employees to fill jobs or trade shifts are made by the steward (A. 136, 138, 158). There was no volunteer or voluntary trade of shifts even on holidays (A. 138-140). On Christmas, for example, TWA would determine the number of people required to maintain service and advise the steward of the needed positions. The steward then makes contacts to see who wants to work, and if he is not able to satisfy the required number, the junior people are required to work (A. 138-140).

A uniform application of the seniority principles among all covered TWA employees is important in assuring a fair, organized and systematic working schedule (A. 151-154). The employees represented by the unions view seniority as a very serious and important contractual right (A. 163). Hardison even testified that some union members regard their seniority rights as preciously as he regarded his religion (A. 114). Also, quite a number of TWA's labor grievances involved seniority disputes (A. 163).

Regarding the difficulties of switching employees from shift to shift or job to job, Everett Kussman, TWA's Manager of the Stores Department, testified that TWA did not have complete versatility because of the seniority provision. Kussman stated, ". . . it isn't just like saying from here to here" (A. 140). Even without a seniority system, as the number of instances requiring preferential treatment increase, the difficulty of working out such arrangements would likewise increase (A. 140).

The parties stipulated that the TWA-IAM agreement was negotiated, ". . . without any intent to discriminate against any religion" (A. 41). The district court likewise found that, "The seniority system was not designed with the intention to discriminate against religion nor did it act to lock members of any religion into a pattern wherein their freedom to exercise their religion was limited" (A. 192). The district court also found that, ". . . it was coincidental that in plaintiff's case the seniority system acted to compound his problems exercising his religion" (A. 192).

Hardison's Conversion to the Worldwide Church of God and TWA's Successful Efforts to Accommodate Hardison's Special Religious Holidays and Saturday Sabbath

Hardison began to study the religion known as the Worldwide Church of God in the spring of 1968 (A. 66, 72). That religion observes a Sabbath from Friday at sunset until Saturday at sunset (A. 67).

Hardison wrote Mr. Kussman on April 25, 1968, requesting, "either Friday and Saturday off or from Friday sunset to Saturday sunset off with the hours taken off Friday to be worked on Saturday evening or Sunday. My reason is *I sincerely believe this is the Sabbath and no servile work may be done then*" (A. 27, 28, 79, emphasis added).

On April 27, 1968, Kussman arranged a meeting with Hardison. At the meeting, Kussman and Hardison discussed the religious change in Hardison's life. Hardison said his new religion had special holidays and that he had obligations on his new Sabbath not to work (A. 117-123). Kussman had no objection concerning Hardison's new beliefs but he was concerned about staffing Hardison's job

because of the seniority requirements. Hardison thought he could arrange his Sabbath schedule within the framework of the seniority system (A. 122).

On May 3, 1968, Kussman wrote a memorandum to Burns Prater, TWA's Industrial Relations Representative in the Stores Department, in which Kussman outlined his April 27 meeting with Hardison. The memorandum provided as follows:

> "1. Agreed to steward seeking swap or days off.
>
> 2. Agreed to odd holidays (excused T. O.) if he works the Christian holidays when requested.
>
> 3. He advises you are getting him another job—agreed you should. Belongs to the World Wide Christian Church Garner Ted Armstrong, Ambassador College, Pasadena, California" (A. 28).

Mr. Prater responded to Kussman on May 7, 1968:

> "I haven't made any headway. His time off and day off requirement are too difficult to handle. I understand that no one would swap days off with him" (A. 28).

Kussman was able to agree to excuse time off for the religious holidays because the union had no objection (A. 42, 109, 120).

In September, 1968, Hardison requested and received a conference with Kussman (A. 80). The union steward, James Tinder, was also present (A. 28, 73, 80, 108). Hardison's time off requirements were again discussed. Kussman agreed to excuse time off on specific religious holidays if Hardison agreed to work on regular holidays. The steward was agreeable to the holidays being excused but in any swap or job change the seniority system would have to be followed (A. 81, 82, 108).

October 4, 1968, Hardison wrote Kussman informing him that the day off requirement was met by a transfer to the 11:00 p.m. to 7:00 a.m. shift. Hardison renewed his request for days off on his religious holidays which Kussman had promised to excuse and he thanked Kussman "for your sincere and understanding consideration and cooperation." In response, Kussman asked for a list of the religious holidays and again pointed out that for "reasons beyond my control" problems could arise "because of the union method of scheduling in turn" (A. 28-29). On October 20, 1968, Hardison supplied the dates of his religious holidays and told Kussman "I would like to thank you again for your sincere understanding and cooperation in this matter" (A. 29-31).

Following the April 25 memorandum and April 27, 1968 meeting through September, 1968, Hardison continued to work on his Sabbath including some voluntary overtime work which he was not required to do (A. 73-74, 79-80, 100-101). He made no request to have his Sabbath as a day off between April and October, 1968 (A. 123).

Hardison's Voluntary Transfer for His Own Convenience to a Shift in Which He Did Not Have Sufficient Seniority to Insure His Ability to Observe His Sabbath

On December 2, 1968, Hardison voluntarily transferred from Building No. 1, where he had sufficient seniority to maintain a shift in which he could observe his Sabbath, to Building No. 2, where he was close to the bottom on the seniority list[2] (A. 67, 68, 103, 104). Hardison knew, prior to the transfer, that he would have such low seniority and that he could anticipate circumstances which would require

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2. The Stores Department in Building No. 1 and the Stores Department in Building No. 2 have two separate and different seniority groupings (A. 24, 103-104).

him to work on his Sabbath because of junior employees having vacation shifts or being otherwise unable to work (A. 104, 105). Hardison testified that he transferred because he was married and a change to Building No. 2 permitted him to work the day shift so that his evenings would be free[3] (A. 103-104).

Mr. Wyatt, the man immediately below Hardison in seniority in Building No. 2, scheduled a two-week vacation for March 3, 1969, through March 14, 1969 (A. 7). This meant that Hardison was scheduled to work on two Saturdays, March 8 and 15, 1969.[4]

TWA's Efforts to Again Accommodate Hardison's Sabbath

As soon as Kussman observed the schedule requiring Hardison to work on Saturday, he initiated a meeting with Hardison and Tinder on March 6, 1969 (A. 69-72, 76, 126-127). Kussman sought to accommodate Hardison by agreeing to any trade of shifts or change of section agreeable to the Union and Hardison (A. 70, 77-78, 127). Tinder, however, would not waive the seniority rights of other union members so that any transfer or swap would have

3. Hardison was later divorced by his wife for grounds of nonsupport. He did not contest the divorce even though his Bible permitted divorce only on one different ground (Pet. A63).

4. Hardison's problem of not having his Sabbath as a day off was a permanent, not temporary, problem. The problem became acute during and after the above-noted two-week vacation schedule. Hardison missed work not only on the two Saturdays covered by Wyatt's vacation, March 8 and 15, 1969, but also on March 22, 1969. After March 22, 1969, Hardison was able to transfer to the twilight shift. He then left work on his new shift at sunset on Friday, March 29, 1969. It was never contended by Hardison, at trial, that his Sabbath problem was temporary. See Hardison's proposed findings of fact set forth in the Appendix filed with the court of appeals (Tr. App. 82-113). Also, the chairman of the Union Grievance Committee testified that Hardison had, ". . . a permanent problem, not a temporary one" (A. 178).

to meet the seniority provisions of the contract (A. 70, 71, 110-112, 145, 146). There were no other jobs open for bid and any shift or change was impossible within the seniority framework (A. 70, 92, 110-112, 213-217). Despite TWA's consent, the union was not willing to violate the seniority provisions to make a swap for Hardison (A. 107-224). Thus, accommodations acceptable to both Hardison and TWA were rejected by the union (A. 107).

The suggestion of Hardison working a six day week with his Sabbath off was discussed but the union could not agree because of the "40 hour work clause," namely, that any time over the standard 40 hour work week would be overtime pay and subject to seniority rights (A. 71). TWA could not allow Hardison a four-day work week because it needed regular employees and a four-day week would deprive TWA of work coverage on a day it needed a man to work (A. 127-128, 146, 153, 157, 244). For the same reasons, TWA could not fill Hardison's position with supervisory personnel, a person from a different work area or bring in a man not working (A. 125, 143, 150, 162, 240, 244). Also, time off for Hardison would have usurped seniority in another section or required overtime help at premium pay between one and one-half and double time (A. 126, 128, 216).[5] Moreover, the overtime on weekends would not be compulsory and TWA might not be able to get it (A. 128, 215-216). On a continuing basis, to require such overtime would indicate a company distortion of the seniority system (A. 134, 135, 142).

TWA believed it could do no more to accommodate Hardison (A. 135). TWA did, however, authorize the steward to ignore seniority and contact other employees.

5. The parties stipulated concerning the actual hourly rate of pay (A. 61).

It was the steward's normal task to do so (A. 106, 127, 138, 158).

At the conclusion of the March 6, 1969, meeting, Hardison was not satisfied with the fact that he would have to work on Saturday, March 8, 1969, but he did not file a grievance or take his problem to any union committee although he knew he could do so (A. 93).

Hardison was the only person scheduled to work in his essential job on his weekend shift (A. 75, 125, 156). As noted above, Hardison's department was obligated to supply airline needs in the event of emergencies. To leave his position empty could have imperiled the supplying of parts for airline operations (A. 116, 143), the work in his area could have been endangered (A. 125) and flights could be delayed or cancelled (A. 116, 143, 160, 161). If overtime help was not available to fill Hardison's job, the work was so important that a supervisor would have had to fill the job (A. 142) even though another work area would suffer (A. 125-128, 162). As Mr. Wilbur Stone, TWA's director of Industrial Relations at the overhaul base, testified, "It is a matter of being available to do the things that have to be done at that time (A. 162).

TWA's efforts at accommodation were complicated because of the minimal weekend work force required by contractual obligations with IAM (A. 120, 216). In fact, the collective bargaining agreement provided:

> ". . . At overhaul bases, every reasonable effort will be made in the future to arrange work schedules to allow Saturday and Sunday as regular scheduled days off. . . .
>
> * * *
>
> Except in an emergency, an employee will not be required to work overtime against his wishes." (A. 216).

Hardison also testified that employees with high seniority preferred not to work on weekends (A. 104). Thus, the number of employees available for weekend work was restricted because of seniority rights (A. 120, 134, 135, 154, 155).

In the opinion of Mr. Stone, if seniority variances based on religious preferences were granted, there would be a considerable number of employees requesting schedule changes. If all such employee requests were granted, it would be administratively impossible to maintain a fair, organized and efficient work schedule (A. 150-159). Moreover, had TWA forced another employee to trade shifts in violation of the seniority agreement, TWA would have been subjected to employee morale and grievance problems (A. 114, 135, 154-159, 238-245).

Hardison conceded that if he had been allowed to bump out of seniority, it would necessarily mean that an individual not sharing his religious beliefs would be deprived of seniority rights (A. 114).

Hardison's Discharge and Failure to Cooperate With the Union to Appeal His Discharge

Hardison was absent from his scheduled work on March 8 and 15, 1969 (A. 31). On March 21, 1969, Hardison met with A. J. Butcher, Supervisor of Stores Planning and Control, and Tinder. As a result of that meeting, Butcher wrote Hardison advising that a discharge hearing would be scheduled if Hardison failed to appear for work on March 22, 1969 (A. 32, 33). Hardison was absent from work on March 22, 1969 (A. 31). On March 25, Hardison was advised that a discharge hearing was scheduled for March 28, 1969 (A. 34).

Prior to the discharge hearing, Hardison changed from the day shift to the twilight shift. This change enabled him

to have a day off on Saturday (A. 170-171). The union then believed that it could argue, at the discharge hearing, that the problem was solved; however, Hardison quit at sundown on Friday, March 28, 1969, and it became apparent to the union that Hardison's conflict had not been resolved and that the problem was permanent and continuing (A. 170-171).

A discharge hearing was held pursuant to the collective bargaining agreement. As a result of the hearing, Hardison's employment was terminated at the end of his shift on April 2, 1969 (A. 34-35). After his discharge, Hardison failed to file a grievance or cooperate with the union's efforts to appeal from the discharge hearing (A. 42, 175-176, 178-182, 231-232). Nor did Hardison, at any time, seek even a temporary solution through an *ad hoc* union relief committee (A. 143-145, 178, 180).

At no time did TWA intend to discriminate against Hardison or his religion (A. 159). Indeed, Kussman, a religious man himself, testified that he "respected the man's religious convictions" (A. 122 and 128) but that he did not believe ". . . in keeping with normal industrial practices in this nation, that I could require someone else to work in his place out of his work assignment on a continuing basis . . ." (A. 135). Similarly, no defendant made any statements impugning or expressing animus against Hardison's religious beliefs (A. 41).

The Disparate View of the Facts and Applicable Duty to Reasonably Accommodate Without Undue Hardship Made by the District Court and the Court of Appeals

After a full evidentiary hearing, the district court observed that it was ". . . impressed with the men who were on the line handling the problem" (Pet. A.64 and R. 279, 280, 474). Judge Oliver found and concluded that, given

TWA's twenty-four-hour-a-day, seven-days-a-week business requirements (A. 244), TWA took appropriate action to accommodate Hardison by holding several meetings, including the meeting Kussman initiated, in an attempt to find a solution. TWA did accommodate Hardison's religious holiday observances and the steward was authorized to breach the seniority agreement (A. 238-240).[6] Hardison had an important job on the weekends and to replace him would leave other work areas without coverage (A. 244). To replace Hardison with another employee would also entail payment of premium wages (A. 244). With respect to any asserted duty to change shifts, Judge Oliver found that the seniority provisions prevented TWA from imposing, without union consent, upon other employees because of one employee's religious beliefs (A. 244) but that ". . . this case is a perfect example of a situation in which a *union* could accommodate [as] *TWA agreed* that plaintiff could change shifts if the union approved" (A. 224, emphasis added). Judge Oliver also referred to the seniority provisions of Title VII, 42 U.S.C. § 2000e-2(h) which permits different treatment to different employees based upon a bona fide seniority system (A. 244-245) and found that the seniority system was not designed with the intention to discriminate against religion nor did it act to lock members of any religion into a pattern wherein their freedom to exercise their religion was limited (A. 227). It was

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6. The district court, in its opinion, referred to Edwards and Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 Mich. L. Rev. 599, 628 (1971) and stated that the authors described the burden of proving the absence of undue hardship as nearly impossible to demonstrate if the work force is large enough: "They rightly argue that such an interpretation imposes a priority of the religious over the secular in that it might require an employer to favor employees whose religious beliefs require them to follow different schedules than the regular over other employees, even to the point of violating the other employees' bargained for rights" (citation omitted) (A. 224-227). The district court concluded that any other decision would raise constitutional questions (A. 226).

only "coincidental" that the seniority system acted to compound Hardison's problems in exercising his religion (A. 227). Judge Oliver, therefore, held that the unions were subject to the accommodation requirement and that they too had met their duty "under the circumstances of this case" (A. 228 and 231).

Notwithstanding the district court's firsthand observation of the witnesses and the opportunity to determine their credibility, the court of appeals, after having the matter under advisement for 53 weeks, found Judge Oliver's findings of fact clearly erroneous and proceeded to impose a far stricter duty upon TWA than did the district court. For the court, Judge Webster cited Matthew 27:24 and cast TWA in the role of "Pontius Pilate" (A. 254). The court of appeals disagreed with the findings of fact by the district court (A. 256) and, essentially because of TWA's size, concluded that TWA could have permitted Hardison to work a four-day week despite being left shorthanded on other shifts or TWA could have required a supervisor or other worker to fill Hardison's job even though that too could cause work functions in other areas to suffer (A. 256-258); that TWA could have violated the seniority provisions of the collective bargaining agreement despite no union consent being given (A. 259-261); and that TWA could have incurred the additional expense of securing an overtime replacement (A. 258).[7] Thus, it did not matter

7. The court of appeals asserted that neither Hardison nor his religion would have benefited from such an accommodation; however, the district court sustained an objection to a question as to whether Hardison had agreed to share any recovery in this lawsuit with his religion (A. 258, n. 9 and Pet. A63-64). It is apparent that no other employee would have had a four-day work week and no other religion would be able to require an employer to incur such extra costs so that church members could supposedly attend church and make regular contributions. Other erroneous and inconsistent factual assertions by the court of appeals will be discussed *infra* in respect to the argument that the court of appeals violated Rule 52(a) Fed.R.Civ.P. by trying the case *de novo*.

to the court of appeals that TWA had no intent to discriminate; that there was no history or lingering vestiges of a past pattern of discriminatory practices against any religion; that TWA had initiated and held meetings with Hardison and the union to find an accommodation; that TWA, with union consent, granted Hardison's needs to have special days off for his religious holidays; that other employees, who viewed seniority as an important right and who did not share Hardison's religious belief, would be deprived of uniformly applied seniority rights; that TWA consented to any shift, swap or job change to which the union would agree; that, without union consent, TWA could face employee morale and grievance problems in ignoring seniority, particularly when a large number of TWA's grievances already related to seniority problems; that if TWA had to grant similar preferential treatment to its many employees' diverse religious practices, that it would become impossible to schedule work; that Hardison was the only person fulfilling his important job on his shift with an already reduced weekend work force; or that Hardison voluntarily and knowingly jeopardized his ability to observe his Sabbath by transferring to a new shift where he was next to the last on the seniority list. The court of appeals, in essence, read the words "*reasonable* accommodation" (emphasis added) out of the statute thereby equating discrimination with a good faith failure or inability to "find" an accommodation (A. 259, n. 10). The "undue hardship" test was construed to mean "*manifestly* undue hardship" (A. 257, n. 8).

SUMMARY OF ARGUMENT

The religious accommodation requirement of Title VII violates the Establishment Clause of the First Amendment. The neutrality required by the Constitution is not observed

because the challenged statutes and guidelines compel a private employer to grant preferential treatment to an employee solely because of his religious beliefs notwithstanding the employer's own beliefs or business needs, the presence of uniformly administered work rules emanating from a bona fide nondiscriminatory collective bargaining agreement containing seniority provisions, the rights of other employees who may or may not have any religious beliefs, and the lack of any intentional discrimination. Because of the 1972 amendment's purpose to aid religion, primary effect of advancing religion and pervasive entanglement of government in religious issues, the accommodation requirement falls within the prohibition of the Establishment Clause. The broad definition of religion to include all religious practices compounds the constitutional defect.

The court of appeals erred in imposing an unrealistic standard upon the employer and in violating Rule 52(a) Fed.R.Civ.P. by trying the issues of reasonable accommodation and undue hardship *de novo*. Discrimination was equated with a good faith inability to accommodate: The court failed to consider the adverse impact the requirement has upon important and pre-existing national policies embodied in the Railway Labor Act and the National Labor Relations Act. The realities of work scheduling problems, the need for uniform work rules and problems resulting from employee grievances were also ignored despite the language of Section 703(h) that protected, ". . . bona fide seniority system[s] . . . provided that such . . . are not the result of an intention to discriminate. . . ." An employer with a large labor force was precluded from satisfying the standard by anything short of actual accommodation. The district court, on the other hand, applied a proper standard in finding that TWA had taken affirmative action to accommodate and that further steps would have constituted an undue hardship upon TWA's continuous operation requirements. Additionally, in the circumstances of this case, no duty existed to violate, without union consent, a bona fide and nondiscriminatory seniority system.

The district court had the opportunity to observe the witnesses and to judge their credibility. The evidentiary record amply supports the district court's findings. The court of appeals' substitution of its own view of the facts violates Rule 52(a), thereby requiring the exercise of this Court's supervisory powers. The fundamentally different role of the trial and appellate courts must be respected if a workable standard for the determination of "reasonable accommodation-undue hardship" is to be attained.

ARGUMENT

I. The Statutory and EEOC Guideline Requiring an Employer to Accommodate an Employee's Religious Practices Violate the Establishment Clause of the First Amendment.

At the time of Hardison's discharge, Section 703(a)(1) of the Civil Rights Act of 1964 provided, in pertinent part, as follows:

> "It shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1).

There was no provision for any duty on the part of the employer to accommodate the diverse religious beliefs of employees. However, in 1967, the EEOC announced a

guideline expressing its belief that Section 703(a)(1) included an obligation on the part of the employer to ". . . make reasonable accommodations to the religious needs of employees . . . where such accommodations can be made without undue hardship on the conduct of the employer's business . . ." 29 C.F.R. § 1605.1(b). The EEOC also placed upon the employer the burden of, ". . . proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable." 29 C.F.R. § 1605.1(c).[8]

In 1972, Congress amended the original statute by defining "religion" in Section 701(j) of the Act as follows:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j).

While both the district court and court of appeals held that the 1972 amendment reflected the intent of Congress

8. The 1967 guidelines replaced an earlier version, promulgated in 1966, which had imposed a less onerous burden on the employer to accommodate the religious practices of his employees. 31 Fed. Reg. 8370. The 1966 guidelines had required no accommodation whatever if such efforts would have resulted in either a serious inconvenience to the employer or a disproportionate allocation of unfavorable work. Further, the guidelines authorized the employer to prescribe a work week applicable to all his employees, even if his schedule did not operate uniformly in its impact upon their religious practices. Specifically, the guidelines provided:

> "The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alteration in such requirements to accommodate his religious needs."

vis-a-vis the EEOC's 1967 revised guidelines (A. 233-236 and 253-254), the question of retroactivity has not been resolved.[9]

The 1972 amendment and the 1967 revised guidelines represent efforts by the Federal Government to impose upon private employers the duty to give preferential treatment to employees solely because of the employees' religious beliefs. Far from enhancing less discrimination in employment, the statute and guideline, as construed by the court of appeals, not only create more discrimination by inexorably dispossessing employees of bona fide seniority rights and other uniform work rules bargained for on behalf of all employees, but they also raise inevitable questions concerning which employee's religion is to be preferred. The requirement cannot withstand constitutional muster under the Establishment Clause of the First Amendment. In granting such preferential treatment, the employer also runs afoul of the thrust of *McDonald* v. *Santa Fe Transportation Company*, ... U.S. ....., 49 L.Ed.2d 493 (1976) that all discrimination in employment is a matter of national concern. The requirement thus extends far beyond the intent and scope of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) and the therapeutic inten-

9. See generally *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, 331, n. 1, 334 (6th Cir. 1970), *aff'd* by an equally divided Court, 402 U.S. 689 (1971); *Riley* v. *Bendix Corp.*, 330 F. Supp. 583 (M.D. Fla. 1971), *rev'd* 464 F.2d 1113 (5th Cir. 1972); and *Kettel* v. *Johnson & Johnson*, 337 F. Supp. 892 (E.D. Ark. 1972). The court of appeals noted that "a different panel of the Sixth Circuit (Edwards J., dissenting) seems to have receded from its prior holding that the regulation was consistent with the statute. *Reid* v. *Memphis Publishing Co.*, 521 F.2d 512 (6th Cir. 1975). We are more persuaded by the earlier opinion and Judge Edwards' dissent" (A. 254, n. 1). On November 15, 1976, certiorari was denied in *Reid*, No. 75-1105. It is TWA's position that the amendment can only be given a prospective application. Thus, no duty to accommodate ever existed in this case. *Peony Park* v. *O'Malley*, 223 F.2d 668 (8th Cir. 1955), *cert. denied* 350 U.S. 845, *rehearing denied* 350 U.S. 898.

tions of *Franks* v. *Bowman Transportation Corp.*, ... U.S. ....., 47 L.Ed.2d 444 (1976).[10]

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10. *Griggs* sought to outlaw invidious *racial* discrimination by prohibiting discriminatory preferences for any group resulting from "artificial, arbitrary and unnecessary barriers" so that "race, *religion*, nationality and sex become *irrelevant*." *Id.* at 431 and 436 (emphasis added). *Franks* did not concern a bona fide seniority system that, as in this case, was admittedly and by court finding nondiscriminatory toward any religion and one that did not lock in the effects of past discrimination.

Neither *Griggs* nor *Franks* presented Establishment Clause issues. A Federal Government attempt to require private employers to accommodate the varying and diverse religious practices of employees must be governed by different standards. For one thing, religious beliefs are undeniably subjective and race is not. Also, religious beliefs may be acquired and abandoned at will, whereas race cannot be so altered. Indeed, numerous legal commentaries have concluded that the accommodation requirement violates the Establishment Clause. See generally: Edwards and Kaplan, *Religious Discrimination and the Rule of Arbitration Under Title VII*, 69 Mich. L. Rev. 599, 628 (1971) wherein the authors expressed concern that the duty to accommodate placed an intolerable burden on the employer, that the burden of proving the absence of undue hardship was nearly impossible to demonstrate if the work force is large enough, that the requirement imposes a priority of the religious over the secular and that it is premised on a fundamentally distorted conception of the proper place of religion in a secular society. See also, Recent Development, *Can the Government Require Accommodation of Religion at the Private Job Site*, 62 Va. L. Rev. 237, 257-258 (1976) in which it is concluded that the accommodation requirement finds, ". . . little justification in establishment clause jurisprudence . . . [nor] is the accommodation supported by an overriding secular government interest. Not even historical practice supports the rule. Consequently, it breaches the governmental neutrality on questions of religion required by the first amendment"; Note, *Is Title VII's Reasonable Accommodation Requirement A Law Respecting an Establishment of Religion*, 51 Notre Dame L. Rev. 481, 491 (1976); *Constitutional Law—Establishment Clause—Sixth Circuit Questions Validity of the Reasonable Accommodation Rule*, 44 Fordham L. Rev. 442 (1975); and Comment, *Up Against the Accommodation Rule*, 45 U.M.K.C. L. Rev. 56, 70-74 (1976). Compare with, Note, *Title VII—Religious Discrimination—Employer's Duty to Reasonably Accommodate Employee's Religious Practices*, 9 Creighton L. Rev. 795, 805. *But see* Note, *Civil Rights—Religious Discrimination In Employment—Title VII Standards of "Reasonable Accommodation" and "Undue Hardship" Are Constitutional, But Recent Cases Illustrate Judicial Overzealousness In Enforcement*, 54 Tex. L. Rev. 616 (1976) and Comment, *Religious Observance and Discrimination in Employment*, 22 Syracuse L. Rev. 1019 (1971).

The Establishment and Free Exercise Clauses are framed in absolute terms and this Court has been compelled to find a neutral course between the two, *Walz* v. *Tax Commissioner*, 397 U.S. 664, 668-69 (1970). The history of the nation and the legal development of the first amendment indicates that we are a "religious people" and that some relationship between government and religious organizations is inevitable. *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952) and *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 760 (1973). As a result of the "tension" between the two clauses and the practical reality of "some relationship", a general constitutional requirement has emerged that the state must maintain an attitude of "neutrality". *Id.* at 788. While *Nyquist's* "three-part" test synthesized the constitutional standards and guidelines applicable to the Establishment Clause, a reference to cases preceding *Nyquist* underscores the searching scrutiny to which this Court has subjected governmental actions that are challenged as impermissibly benefiting religion. The channel is a "narrow one". *Id.* at 776.

The early leading case dealing with the Establishment Clause is *Everson* v. *Board of Education*, 330 U.S. 1 (1947). There Mr. Justice Black vividly portrayed the historical strife and persecutions resulting from the relationship of government with various competitive religious beliefs. The desire to be free from such debilitating disputes gave birth to the Establishment Clause.[11] *Everson* held that under the Establishment Clause, neither a state nor the federal government could, "pass laws which aid one religion, aid all religions or prefer one religion over another,"

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11. The history and development of the Establishment Clause is thoroughly reviewed in many decisions of this Court. See generally *Everson*, at 33 (Rutledge, J. dissenting) and *Abington School District* v. *Schempp*, 374 U.S. 203, 234 (1963) (opinion of Brennan, J.).

Id. at 15. The "wall of separation" language. *Id.* at 16, articulated a separationist or no-aid-to religion view. The government must be "neutral in its relations with groups of religious believers and non-believers". *Id.* p. 18.[12]

The accommodation requirement violates the constitutional command and extends far beyond the general neutral benefit narrowly countenanced in *Everson's* factual context. Here, as contrasted to *Everson's* facts, the government is requiring a private person to accede to and accommodate another person's religious beliefs. Thus, regardless of whether the accommodated beliefs are compatible with personal or business needs, an accommodation is required unless an *undue* hardship can be proved by the accommodating person. Nor does it matter that the rights of third parties may be adversely affected. Additionally, the requirement is not, in any sense, neutral as between religious "believers and nonbelievers."

Subsequent to *Everson*, this Court's parameters of tolerable government activities has, in practice, been carefully circumscribed. Illustratively, those laws requiring the religious exercises of school prayers were held to violate the Establishment Clause in *Engel* v. *Vitale*, 370 U.S. 421 (1961) and *Abington School District* v. *Schempp*, 374 U.S. 203 (1963). The laws were found to have the purpose and primary effect of advancing religion. The release

12. In *Abington School District* v. *Schempp*, 374 U.S. 203, 222 (1963), Mr. Justice Clark noted that this Court has rejected unequivocally the contention that the Establishment Clause forbids only government preference of one religion over another. The wholesome neutrality sought by the Court, ". . . stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions . . . to the end that the official support of the State or Federal Government would be placed behind the tenets of one or all of the orthodoxies." See also, *Id.* at 259 (opinion of Brennan, J.). *Torasco* v. *Watkins*, 367 U.S. 488 (1961); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968) and *Walz*, *supra*, at 695 (opinion of Harlan, J.) *Id.* at 713 (Douglas, J. dissenting).

time prayer program in *McCollum* v. *Board of Education*, 333 U.S. 203 (1947) was likewise found to violate the Establishment Clause. Even after removal of many coercive aspects, the concept narrowly survived constitutional review in *Zorach*, *supra*. Similarly, the state purchase of *secular* school books for the benefit of all children barely escaped constitutional invalidity in *Board of Education* v. *Allen*, 392 U.S. 236 (1968).[13] Yet, in *Torasco* v. *Watkins*, 367 U.S. 488 (1961), the interests of a state in the integrity of officials, while important, did not warrant the screening of applicants by a religious test.

In very limited cases, this Court has permitted laws to withstand constitutional attack if, for example, an overwhelming state interest was involved, *Gillette* v. *United States*, 401 U.S. 437 (1971) (a strong governmental interest inherent in selective service exemptions) or where an original religious purpose had historically evolved into a widely accepted secular purpose such as providing a uniform day of rest, *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Braunfield* v. *Braun*, 366 U.S. 599 (1961); *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582 (1961). Also, narrowly defined and historically accepted tax exemptions to all charities, including religious, were approved in *Walz*, *supra*. The Court has also permitted a general and indirect aid of a nonsectarian character

13. Mr. Justice Black's dissent detailed the dangers he viewed as steming from *Allen*. In *Nyquist*, *supra*, at 796, the Court observed that Mr. Justice Black's fears were being obviated by post-*Allen* decisions. One can easily envisage that similar fears could result from approval of the accommodation requirement. It is a short step for a government to hereafter require "reasonable accommodation-undue hardship" as a condition precedent to receiving occupational licenses or the use of employers to make and collect contributions for their religious employees. Similarly, it may well not be considered an unreasonable accommodation for the State to hereafter permit direct or indirect tax subsidies or grants for religious purposes if no "undue hardship" exists.

but only if comprehensive, discriminatory and continuing state surveillance could be avoided. *Tilton* v. *Richardson*, 403 U.S. 672 (1971) and *Lemon* v. *Kurtzman*, 403 U.S 602 (1971). But, care was taken to insure that use of grants for religious purposes was avoided.

Application of the principles established by the foregoing authorities indicates that this case presents a more compelling example of a breach of the Establishment Clause than any factual context heretofore presented to this Court. The granting of special employment preferences to Hardison solely because of his professed religious beliefs is a direct use of the "machinery of the State" to further his religion (*Abington, supra* at 226) and is counterproductive to cardinal provisions of the Railway Labor Act and National Labor Relations Act.

Unlike the situation in *Zorach, supra* at 313, religious practices of various religious groups are not flourishing, ". . . according to the zeal of its adherents and the appeal of its dogma" but rather because the government is coercing a private employer to accommodate the varying religious beliefs and practices of his employees. Thus, a vice of the accommodation requirement is that the State is lending its assistance to a church's efforts to gain and keep adherents. *Abington, Id.* at 228 (opinion of Douglas, J.).[14]

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14. The statute and guideline are facially based upon the impermissible supposition that the coercive power of the federal government is required to insure the viability and vitality of certain religious sects. *Zorach* rejects such a concept. See also, *Id.* at 324-325 (Jackson, J. dissenting):

> "It is possible to hold a faith with enough confidence to believe that what should be tendered to God does not need to be decided and collected by Caesar."

Even if the requirement would apply across the board for all religions, the result is the same—religion as a whole cannot be sustained by the federal government's coercive powers over private employers.

The court of appeals conceded that the view that it is constitutionally impermissible for a government to enforce accommodation of religious beliefs in a manner which results in privileges being available to a believer which are not available to the nonbeliever, is not "without articulate support" (A. 264). Nevertheless, the court of appeals relied upon the district court's opinion which, without an extensive analysis, found the requirement constitutional (A. 236-238). That reliance is misplaced because Judge Oliver's decision below was carefully limited to his view, unlike the court of appeals, that Title VII could not, "be interpreted to require that companies finance employees' religious beliefs" (A. 244) and that shifting employees "out of seniority" and a "hypertechnical application of the words 'undue hardship of the employer's business' " would impose a priority of the religious over the secular and would raise "constitutional questions" (A. 226).[15]

The court of appeals likewise misplaced its reliance upon the constitutional reasoning of the Court of Appeals for the Sixth Circuit in *Cummins* v. *Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), *aff'd* by an equally divided court, ... U.S. ....., 50 L.Ed.2d 233 (1976). It ignored Judge Celebrezze's dissent and agreed, without analysis, with *Cummins'* two-judge majority that *Griggs, supra* and *Gillette* v. *United States*, 401 U.S. 437 (1971) were dispositive of the constitutional challenge (A. 265). The court of appeals did not believe the accommodation requirement advanced religion because "no financial support was mandated" and that, in its view, less government entanglement was involved than in *McGowan, supra* (A. 266). To the contrary Judge Celebrezze's dissent demonstrates the clear danger that if government is allowed to grant such

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15. The district court referred to Edwards and Kaplan, *supra*. See footnotes 6 and 10, *supra*.

benefits, it is thereby empowered to take away basic religion liberties, *Cummins, supra* at 554-560.

Griggs, supra, deals with racial discrimination. It has no conceivable application to the far different Establishment Clause issues presented in this case. *Gillette, supra,* likewise fails to salvage the accommodation requirement. As the court of appeals noted, *Gillette* upheld certain draft exemptions for conscientious objectors upon "pragmatic grounds" (A. 265). The pragmatic realities of the accommodation requirement, on the other hand, require the opposite result in this case. Illustratively, accommodation of employee religious beliefs frequently cannot be made without disruption of work schedules and creation of inequitable preferential personnel practices. The whole country has a high stake in maintaining favorable labor relations between employers and unions, particularly in complex industrial systems. To deprive more senior employees of seniority rights and other uniform work rules to accommodate the diverse religious beliefs of other employees will result in employee grievances, morale problems, work scheduling problems and overtime replacement expenses. Thus, the compelling state interest in the accommodation requirement is far more tenuous and complicated, as well as frustrating to other important and already existing governmental policies, than the singular and unique interest applicable in *Gillette*.[16] Further, the requirement

16. A clear example of the reach of accommodation requirement as construed by the court of appeals below is *Yott* v. *North American Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974). In *Yott*, the Ninth Circuit was confronted with a challenge to a "union shop" provision which *Yott* claimed violated his religious beliefs not to join a union or support one by dues. Objections to union shop agreements on religious principles is not a recent innovation of Title VII, but rather presents a question which has previously been raised and rejected under the Free Exercise Clause. *E.g., Otten* v. *Baltimore & O.R.R.*, 205 F.2d 58 (2d Cir. 1953); *Wicks* v. *Southern Pacific Co.*, 231 F.2d 130 (9th Cir.), *cert. denied* 351

(Footnote continued on following page)

of meeting uniformly applied work rules is not the type of "punishment" that was involved in the criminal prosecution in *Gillette*. Finally, there is no evidence that the accommodation requirement is "secular in purpose," "even-handed in operation" and "neutral in primary impact." *Gillette, supra* at 450.[17]

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U.S. 946 (1956); *Gray* v. *Gulf, M. & O.R.R.*, 429 F.2d 1064 (5th Cir. 1970), *cert. denied* 400 U.S. 1001 (1971); *Linscott* v. *Millers Falls Co.*, 440 F.2d 14 (1st Cir.), *cert. denied* 404 U.S. 872 (1971); *Hammond* v. *Papermakers Union*, 462 F.2d 174 (6th Cir.), *cert. denied* 409 U.S. 1028 (1972). Upon shop agreements, which were in reality an accommodation of religious beliefs because of their limited enforcement rights, *e.g., NLRB* v. *Hershey Foods Corp.*, 513 F.2d 1083 (9th Cir. 1975), were found to be constitutional because the compelling governmental interest in requiring that all employees pay their fair share for union representation outweighed the individual right to the unrestricted exercise of his religion. See, *Linscott* v. *Millers Falls Co.*, 440 F.2d at 17-18. *Yott* thus clearly shows that the accommodation requirement of Section 701(j) may be construed to extend Title VII's protections past those guaranteed by the Free Exercise Clause and to require the employer and other employees to pay for an employee's exercise of his religion. The differing views of the duty to accommodate such union rules are also illustrated by the three opinions rendered in *Cooper* v. *General Dynamics, Convair Aerospace Div.*, 533 F.2d 163 (5th Cir. 1976), *rev'g* in part 378 F. Supp. 1258 (D.C. Tex. 1974).

Furthermore, the large variety of religions and possible accommodation requirements present much greater administrative problems than those present in *Gillette*. For example, as of April, 1975, approximately 77,994,000 persons were employed in non-agricultural establishments, including manufacturing, wholesale and retail trade, government, transportation and public utilities, finance, insurance and real estate, contract construction and mining. U.S. Bureau of the Census, *Statistical Abstract of the United States*: 1975, Table No. 579 at p. 353 (96th ed. 1975).

Membership in religious bodies for the year 1973 totaled 131,245,000. Some denominations celebating a Sabbath which commences on Friday sundown and ends on Saturday, include the following: Seventh-Day Adventists—464,000; Jewish—6,115,000.

The burden imposed upon an employer is by no means limited to reasonably accommodating Sabbatarians. Many Americans are affiliated with non-Judeo-Christian religions which celebrate entirely different holidays. The only such religion with a membership in excess of 50,000 is the Buddhist persuasion—60,000. *Id.*, Table No. 63 at p. 46.

17. See Fordham L. Rev. 442, 449 and 62 Va. L. Rev. 237, 248, 255.

McGowan, supra, was again a practical decision [illegible] approved "Sunday closing" laws having a long history as an accepted tradition which no longer had a non-secular purpose. Rather, the evolved purpose—a uniform day of rest for all workers—was clearly secular. On the other hand, application of the accommodation requirement is directly contrary to *McGowan's* historical tradition and, significantly, unlike *McGowan,* will result in a nonuniform treatment of employees. Indeed, historically, our country has favored uniform work rules without special preferences for any group. Further, the accommodation requirement is not limited to days off for religious purposes but it extends to *all* religious beliefs and practices. Additionally, the Sunday closing cases recognized that a Saturday Sabbatarian, like Hardison, could be required to choose between his religious faith and his economic survival vis-a-vis the uniform day of rest policy underlying the Sunday closing laws. *Braunfield* v. *Braun,* 366 U.S. 599, 616 (1961) (Stewart, J. dissenting). Hardison's personal accommodation would not entail anywhere near the sacrifice sanctioned in *Braunfield* because he could have remained in a shift with no seniority fear of having Saturday work days or he could have found a job more suitable to the requirements of his newly discovered faith. Moreover, no matter how great the sympathy one has for the burdens of conscience, it does not justify, ". . . an eroding of the limitations of the Establishment Clause . . ." *Nyquist, supra* at 790.

The court of appeals' narrow view that the religious accommodation requirement met constitutional muster because "no financial support was mandated for religious institutions" (A. 266) is unsupportable. For one thing, the only conceivable benefit to Hardison was to advance his ability to practice his religion. No other purpose other

than to aid his religion could be construed from the practical effect of accommodation. Moreover, the Establishment Clause is not confined to prohibition of a congressional enactment establishing churches. *Abington, supra* at 220 and *McGowan, supra* at 441. The Clause reaches beyond subsidies or tax benefits and proscribes government nonfinancial "sponsorship" of religious organizations. *Nyquist, supra* at 772. *Walz, supra* at 668 and *Lemon* v. *Kurtzman, supra* at 612. The Establishment Clause thus forbids "subtle departures" from neutrality as well as "obvious abuses," *Walz* at 696 (opinion of Harlan, J.) and *Gillette, supra* at 452.

While not relied upon by the court of appeals, the neutrality theory has, at times, been accommodated after a balancing is made in cases involving the Free Exercise Clause. Two leading cases illustrating such an accommodation are *Sherbert* v. *Verner,* 374 U.S. 398 (1963) and *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972). Neither of those Free Exercise Clause cases are, however, conclusive on the Establishment issues presented. The district court, for example, properly found that it was "coincidental" (A. 227) that the applicable seniority system, and hence employment relationship, acted to compound Hardison's problem in exercising his religion. Thus, no direct violation of the Free Exercise Clause exists. Similarly, just as in *Nyquist, supra* at 788, where the Court rejected the argument that failure to provide aid to parochial schools would be a Free Exercise violation, Hardison has no claim that his Free Exercise rights are violated by meeting uniformly applied work rules. See also *Gillette, supra* at 462, where the Court rejected a Free Exercise claim by arguing that plaintiff's burden was "incidental." Moreover, the relationship of government and the individual under the Free Exercise Clause is wholly different from a private employ-

ment relationship, especially where, as here, a bona fide collective bargaining agreement operates alongside Title VII.[18]

Yoder, supra, is also distinguishable in that it accommodated the long-standing religious and ethnic values of a truly unique group of people, the Amish.[19] There, the government was trying to impose an unwanted and unneeded educational requirement upon the Amish despite

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18. *Sherbert* is distinguishable upon the additional ground that the state statutory scheme there at issue was not even-handedly applied in that it actually and affirmatively discriminated against Saturday, as contrasted to Sunday, worshippers. Here, the seniority provision was uniformly applied. Also, the plaintiff would have been "destitute" in *Sherbert;* whereas, Hardison plainly could seek out employment not requiring Saturday work. In fact, Hardison had such a job at TWA before he voluntarily transferred to a shift in which he knew he would not have sufficient seniority to insure his ability to observe his Sabbath. Finally, in *Sherbert,* unlike here, no other person's rights would be directly and adversely affected by the denial of benefits.

19. While the World Wide Church of God may constitute a religion within the broad meaning of Section 703(a)(1) and 701(j), the record does not reveal that, like the Amish, it has a long, established history demonstrating, ". . . the interrelationship of belief with their mode of life, the vital role of that belief . . . in the continued survival of Old Order Amish." *Yoder,* at 209-212. Further, the typical Amish followers have been born and reared in that unique way of life. The danger of creating an invidious or ill-conceived "exception" to a general obligation was not present. On the other hand, in this case Hardison was a recent "convert." While TWA respected his beliefs and did not discriminate against him, the fact that religious beliefs can be rooted in emotionalism and evolving personal beliefs subjects employers to the added problem of accommodating to the *changing* religious beliefs of employees. Indeed, when hired, Hardison indicated he would work weekend shifts (A. 25). Hardison's own background revealed that he had a proclivity to join unusual organizations as demonstrated by his participation in the Minutemen organization (Pet. A. 63, R. 195-197); however, TWA took no disciplinary steps against Hardison because of any of his beliefs or group memberships. It was only when those beliefs infringed upon the rights of other employees thereby leading to extra costs, work scheduling problems and the administrative problems of employee morale and grievances was TWA able to go no further. It is worthy of note that after Hardison's "conversion," he voluntarily performed premium paying overtime work (A. 74).

a history of "three centuries" as a "successful and self-sufficient segment of American society." *Id.* pp. 209-212. While deferring to the unique facts presented, the Court noted that the "danger of an exception" from a general obligation of citizenship may run afoul of the Establishment Clause. *Id.* at 220-221. Here, in sharp contrast, Hardison is not part of a "self-sufficient segment" but rather he voluntarily thrust himself and his religion into the hustle and bustle of secular life. He bumped into a job position he coveted for secular reasons. He likewise should respect the seniority rights of others and share the disadvantages of being a part of a communal-secular environment rather than being granted a preferential exception from an otherwise neutral and general obligation. In such circumstances, the teaching of Learned Hand in *Otten* v. *Baltimore & O.R.R.,* 205 F.2d 58, 61 (2nd Cir. 1953) should be controlling:

> "The First Amendment protects one against action by the government . . . but it gives no one the right to insist that in the pursuit of their own interests others must conform to his own religious necessity. . . . *We must accommodate our idiosyncracies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfactions from within, or our expectations of a better world.*" (Emphasis added).

While the freedom of *belief* under the Free Exercise Clause is wide-ranging, see *Prince* v. *Massachusetts,* 321 U.S. 158 (1944), in the context of collective bargaining agreements under the Railway Labor Act or the National Labor Relations Act, the Court has properly emphasized the need to subjugate the interests of the individual to those of the union group. *Vaca* v. *Sipes,* 306 U.S. 1 (1967).

The need for uniformity in the application of work rules and labor relations has also been emphasized by the Court. *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957).

A balancing of the Free Exercise desires of individual employees against the obvious need for uniformly applied work rules in the many industries, like TWA, that operate on a continuous basis twenty-four hours per day, seven-days-a-week and 365 days each year and which have thousands of employees with diverse religious practices, must indicate that an employer cannot be required to accommodate individual religious preferences. Indeed, in the collective bargaining context, an even-handed administration of uniform rules actually would serve the compelling interest test of *Sherbert* and guard against the ill-conceived "exception" feared in *Yoder*.[20] Otherwise a special preference for Hardison, and all other employees who claim the same or different reasons for avoiding their work schedules, would be unfair to all other employees by establishing a pattern of discrimination that favors and exempts certain religious believers. That is particularly apt where, as here, the seniority provisions cut across all religious grounds and because there is no evidence of discrimination against Hardison's religion.

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20. See, for example, *Andrews* v. *O'Grady*, 252 N.Y.S.2d 814, 819 (N.Y. 1964):

> "There can be no doubt, from long experience, that the seniority rules to which petitioner has refused to conform are the only fair way to assure that every man is treated on a nondiscriminatory basis with respect to work assignments."

And see *In Re Eastern Greyhound Lines Division of Greyhound Lines, Incorporated* v. *New York State Division of Human Rights*, 27 N.Y.2d 279, 265 N.E.2d 745, 317 N.Y.S.2d 322, *aff'g* 34 App. Div. 2d 916, 311 N.Y.S.2d 465 (1970) where a bearded Muslim was not hired because the employer had a rule against all employees wearing a beard. The refusal to hire was upheld where it was not shown that, ". . . the employment decision was in fact actuated by discrimination against creed." See further, Edwards & Kaplan, *supra* at pp. 630-641.

The accommodation requirement of Section 703(a)(1) and 701(j) cannot withstand review on any part of the three-pronged test set forth in *Nyquist, supra* at 773:

> ". . . the law in question first must reflect a clearly secular legislative purpose . . ., second, must have a primary effect that neither advances nor inhibits religion, . . ., and, third, must avoid excessive governmental entanglement with religion. . ." (Citations omitted).

See also *Meek* v. *Pittenger*, 421 U.S. 349, 358 (1975). A law challenged on Establishment Clause grounds must satisfy each part of the test. See *Nyquist, supra* at 774; *Epperson, supra* at 107; *Abington, supra* at 222; and *Lemon* v. *Kurtzman, supra* at 613-15.

A. The Statute and Guideline Lack a Primary Secular Legislative Purpose.

The legislative history of the Civil Rights Act contains no suggestion that religious discrimination in employment was a problem requiring remedial legislation.[21] More importantly, Senator Randolph, the amendment's sponsor, explained that its purpose was admittedly to stem the "dwindling of the membership of some religious organizations" which prohibit Saturday labor and because of a "possible inability of employers on some occasions to adjust their work schedules to fit the requirements of the

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21. According to Congressman Cellar, then Chairman of the House Judiciary Committee:

> "We did not have very much testimony of discrimination on the grounds of religion. You will notice in one of the titles, religion is left out. . . . We had very little evidence—I do not think we had any of it insofar as the Committee on the Judiciary is concerned that any particular sect or religion had been discriminated against." 110 Cong. Rec. 1528-29 (1964).

faith of some of their workers" 118 Cong. Rec. 705 (1972).[22] Thus, the accommodation requirement was explicitly designed to benefit specific religious groups without regard to an employer's "inability" to adjust work schedules or to the rights of other employees who do not share that religion or who have no religious beliefs. The statutory pur-

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22. The evidence of legislative intent underlying the 1972 "religious accommodation" amendment points to an exclusively nonsecular, sectarian purpose. The provision arose as a floor amendment sponsored by Senator Randolph. 118 Cong. Rec. 705 (1972). The Senator's sponsoring remarks reveal that advancement of religion—specifically, those religions which observe the Sabbath other than on Sunday—was the sole purpose for which the amendment was offered.

> "I am sure that my colleagues are well aware that there are several religious bodies—we could call them *religious sects;* denominational in nature—not large in membership, but with certain strong convictions, *that believe there should be a steadfast observance of the Sabbath and require that the observance of the day of worship, the day of the Sabbath, be other than on Sunday.* On this day of worship work is prohibited whether the day would fall on Friday, or Saturday or Sunday. There are approximately 750,000 men and women who are Orthodox Jews in the U.S. work force who fall in this category of persons I am discussing. There are an additional 425,000 men and women in the work force who are Seventh Day Adventists.
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> I say to the distinguished chairman of the Labor and Public Welfare Committee, who manages this bill, that there has been a partial refusal at times on the part of employers to hire or continue in employment *employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days.* So there has been, because of understandable pressures, such as commitments of a family nature and otherwise, *a dwindling of the membership of some of the religious organizations* because of the situation to which I have just directed attention.
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> * * *
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> *My own pastor* in this area, Rev. Delmar Van Horne, has expressed his concern and distress that *there are certain faiths that are having a very difficult time,* especially with the younger people and understandably so, with reference to a possible inability of employers on some occasions to adjust to work schedules to fit the requirements of the faith of some of their workers." 118 Cong. Rec. 705 (emphasis supplied).

(Footnote continued on following page)

pose to foster religion and, in particular, certain sects could not be clearer.[23]

Moreover, unlike *Nyquist,* the legislative history of the accommodation requirement does not reveal any attempt whatsoever to demonstrate a secular legislative purpose. Thus, the only available history should be taken to mean what it says—that the accommodation requirement was meant to directly aid religion. *Meek* v. *Pittenger, supra* at 363; *Sloan* v. *Lemon,* 413 U.S. 825, 829-30 (1973); *Nyquist, supra* at 773; *Hunt* v. *McNair,* 413 U.S. 734, 741-42 (1973); *Tilton, supra* at 678-79 and *Lemon* v. *Kurtzman, supra* at 613. Nor is there any indication that the original prohibition against religious discrimination in Section 703 (a)(1), assuming arguendo the constitutionality of that ban, required any supplementary legislation to reach acts of intentional discrimination or other invidious forms of religious discrimination. The congressional intent to place "an imprimatur" upon the Saturday worshiper is simply uncontradicted. *Gillette, supra* at 450; *Engel, supra* at 430-31 and *Torasco, supra* at 495. Nor do *McGowan, Gillette, Griggs, Sherbert* or *Walz* support any *sub rosa* secular legislative purpose. Actually, the language of the statute and guidelines indicate that the accommodation requirement

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Time and again, Senator Randolph stressed his objective—to benefit Saturday Sabbatarians.

> "Mr. President, I am a member of a denomination which is a relatively small one, The Seventh-Day Baptists. Perhaps there are only 5,000 individuals within that denomination in the work force. I do think it is important for me to say that within the groups that I have mentioned, we think in terms of our observance of the Sabbath beginning at sundown Friday evening and ending at sundown Saturday evening, following the Biblical words, 'From eve unto eve shall you celebrate your Sabbath.' I make this statement only by way of explanation of the groups I have just mentioned." (118 Cong. Rec. 705-706).

23. 62 Va. L. Rev. 237, 255 and 45 U.M.K.C. L. Rev. 56, 71.

applies only to religious believers as opposed to nonbelievers.

B. The Primary Effect of the Accommodation Requirement Is to Advance Religion.

The foregoing legislative history and the express language of the 1972 amendment and 1967 guidelines demonstrate that a direct effect is to advance religious beliefs. Application of the requirement also advances religion. Indeed, no other effect can be perceived other than to either "aid all religions" or to "prefer one religion over another." *Walz, supra* at 670 and *Everson, supra* at 15. Illustratively, the accommodation requirement, as construed by the court of appeals, gave Hardison special preference *solely* because of his religion. A private employer must develop artificial classification bearing no relationship to any job requirement, qualification, merit or already existing uniform work rule but rather one that stems solely from Hardison's religious beliefs. Unlike *Walz, supra*, there is no broad class of beneficiaries receiving a historically acceptable benevolent benefit. Nor is there any comparable preferential treatment for the nonreligious employee or the employee who simply has a strong need and belief to remain with his family on weekends.

Not only does the requirement extend benefits solely to religious believers but also it places the burden of accommodation upon the employer (and other employees) who may well have contrary religious beliefs. Thus, while the religious taxpayers in *Walz* had standing to attack a broad tax exemption, the impact of the exemption was not as immediate or real as that the employer experiences in bearing the burden of accommodation without *undue* hardship. Illustratively, a direct out-of-pocket cost is plainly contemplated by the court of appeals (A. 258). Similarly,

unlike *Tilton, supra*, the aid here is ideological in character in that it specifically furthers religious observances.

The above difficulties are compounded by the TWA-IAM bona fide seniority provision which creates extra burdens for the employer as well as bringing into play the contractual rights of other employees. Hardison conceded that many of his fellow employees and union members regarded their seniority rights as preciously as he held his religious beliefs and that if he were allowed to bump out of seniority, it would necessarily mean that an employee who did not share his religious beliefs would be denied seniority rights (A. 114).

The court of appeals held that the accommodation requirement did not preclude "some cost" to TWA (A. 258). Surely, as the district court found (A. 244), to force others, whether it is the employer or other employees, to incur out-of-pocket costs is effectively requiring an employer to finance an employee's religious practices. The effect of advancing religion is achieved whether the payment, or "accommodation," is direct or indirect.[24] *Nyquist, supra*.

This Court has consistently invalidated legislative schemes whose benefits have flowed "*primarily*," much less the exclusive type involved here, to the parents of children attending sectarian schools. *Nyquist, supra* at 794 (emphasis added).

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24. As noted in footnote 7, *supra*, it is not clear from the record that Hardison's religion would not share in any award he might receive in this litigation but it is clear that religions could encourage members to take advantage of the accommodation requirement to help assure larger church attendance and correspondingly fuller collection plates. See also 51 Notre Dame L. Rev. 481, 491 (1976), *supra* and 45 U.M.K.C. L. Rev. 56, 72-73.

C. The Statute and Guideline Patently Require Pervasive and Excessive Government Entanglement With Religion.

In reviewing the reasonable accommodation requirement, one question is whether government involvement requires an "official and continuing surveillance leading to an impermissible degree of entanglement," *Walz, supra* at 675. See also *Lemon* v. *Kurtzman*. Unlike the long history demonstrating that no excessive government entanglement had occurred in *Walz*, the accommodation requirement has already resulted in a sustained and detailed administrative entanglement with religion. Thus, the reasonable accommodation requirement reaches *"all aspects of religious observance and practice as well as belief."* Section 701(j), 42 U.S.C. § 2000e(j) (emphasis added). Consequently, those enforcing the requirement will necessarily weigh and determine whether an individual has a religious belief, whether it is sincerely held and how that belief is manifested in the employment relationship.[25]

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25. Senator Randolph contemplated—and endorsed—precisely such involvement, as witnessed by the colloquy accompanying his introduction of the 1972 amendment:

> "Mr. Dominick. Am I correct in understanding that the amendment allows *flexibility* both to the EEOC and to its investigators to determine whether or not any particular group of religious adherents are having their customary observance of their religious activities unduly interfered with? *In other words, flexibility is provided so that someone could make a discretionary judgment on it?*
>
> Mr. Randolph. The Senator from Colorado correctly follows me in the thinking that I have placed in the language of the amendment that *there would be such flexibility*, there would be this approach of understanding, *even perhaps of discretion*, to a very real degree. 118 Cong. Rec. 706 (1972)" (emphasis supplied).

Such "flexible" and "discretionary" bureaucratic judgment will inevitably give rise to the danger of "erratic decisionmaking" which this Court has previously identified as a primary source of improper entanglement. *Gillette* v. *United States*, 401 U.S. at 458.

The entanglement does not cease upon a determination that bona fide religious practices are present because then the government must determine whether a private employer can "reasonably accommodate" without "undue hardship." Not surprisingly, the EEOC has promulgated extensive, and oftentimes contradictory, guidelines attempting to define the duty imposed upon the employer. Those guidelines affect all employees as well as the employer. The government is thus inextricably involved in serious and practical day-to-day work scheduling problems for employers and labor organizations. Moreover, the role of the government has, in actual practice, entailed far more than a simple judgment by the EEOC or the courts (A. 237). The notion that any type of sterile judgment can be made is belied by the number of times that federal judges have disagreed as to what factually constitutes "reasonable accommodation" and "undue hardship."[26] Moreover, the nature of zealously

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26. The following decisions involve reversals of district court findings and opinions in the religious discrimination area. *Dewey* v. *Reynolds Metals Company*, 429 F.2d 324 (6th Cir. 1970); *Riley* v. *Bendix Corporation*, 464 F.2d 1113 (5th Cir. 1972); *Reid* v. *Memphis Publishing Company*, 468 F.2d 346 (6th Cir. 1972) and 521 F.2d 512 (6th Cir. 1975), *cert. denied* November 15, 1975, No. 75-1105; *Young* v. *Southwestern Savings & Loan*, 509 F.2d 140 (5th Cir. 1975); *Cummins* v. *Parker Seal Company*, 516 F.2d 544 (6th Cir. 1975); *Reid* v. *Memphis Publishing Company*, 521 F.2d 512 (6th Cir. 1975); *Draper* v. *U. S. Pipe & Foundry*, 527 F.2d 515 (6th Cir. 1975); and *Hardison* v. *Trans World Airlines, Inc.*, 527 F.2d 33 (8th Cir. 1975). Compare with *Cooper, supra*. See also *Roberts* v. *Hermitage Cotton Mills*, 8 E.P.D. ¶ 9589 (4th Cir. 1974); *Johnson* v. *United States Postal Service*, 497 F.2d 128 (5th Cir. 1974); *Williams* v. *Southern Union Gas Co.*, 529 F.2d 483 (10th Cir. 1976), *cert. denied* November 15, 1976, No. 75-1511; and *United States* v. *City of Albuquerque*, 9 E.P.D. ¶ 10,182 (D. N. Mex. 1975), *aff'd* ..... F.2d ....., 12 E.P.D. ¶ 11,244 (10th Cir. November 29, 1976). These latter cases represent instances where the district court findings were upheld and each case is strikingly similar factually to the facts presented in this case.

Draper is apparently the most recent of the widely differing Sixth Circuit opinions concerning Title VII religious discrimination cases. The court reversed the district court and held for the employee upon the supposed basis of clearly erroneous find-

(Footnote continued on following page)

held religious beliefs is such that in some minds an accommodation must be made. By the same token, what may be a very real undue hardship to the employer may seem remote to those not involved in the day-to-day work process. Under such circumstances, the fairness or bias of governmental decision makers is a matter of concern which can lead to strife as well as cynicism for the respect owed government institutions.[27]

Competition among religious sects for political and religious supremacy has generated considerable civil strife throughout history as a result of efforts to maintain or secure the support of government. *Everson, supra.* The accommodation requirement is ripe with the potential to ignite dissension among employees over another employee's special treatment. For example, TWA cannot contractually require overtime unless an emergency exists (A. 216). Yet, the court of appeals would characterize Hardison's Sabbath observance as an "emergency." The work force would become a prime target for strife if one employee's religious beliefs are any more of an emergency than, for example, the opening of trout season. Thus, this is the type of gov-

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ings by the district court. Judge Engel strongly dissented by setting forth the district judges' findings of fact which actually discussed the factual concern of the two-judge majority. He found it a "surprise" that the findings could be deemed clearly erroneous and stated on page 524: "What makes the district court's findings here so especially entitled to credit is the fact that there is absolutely no suggestion of religious bias or prejudice in the record. Draper was a valued and greatly needed employee who enjoyed a close friendship with the man who finally discharged him. These additional circumstances strongly support a finding that the company was willing to and did undergo considerable hardship in order to retain him. This is not a case where Draper's discharge was pretextual, masking a latent bias against his faith or against him for adhering to it."

27. See, for example, Rabinowitz, "The Bias In The Government's Anti-Bias Agency", Fortune, Vol. XCIV No. 6, December, 1976.

ernment involvement that is "apt to lead to strife" (*Walz, supra* at 716 [Opinion of Harlan, J.]).

The court of appeals ignored the potential strife that could result from employee morale and grievance problems (A. 258, 261). That approach is improper because the Establishment Clause was intended to prevent the outbreak of dissension and strife as well as the government's exaction of money from private persons solely for the benefit of another person's religious practices.

The seriousness of a breach of the Establishment Clause has never been equated with "the number of people who complain," *Abington School District, supra* at 264 (opinion of Brennan, J.) or the imposition of only "some cost."[28] Nor did it matter in *Engel, supra* that the amount of time for school prayers was small or that few complaints were made.

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28. Mr. Justice Black stated in *Everson, supra* at page 16, that:

> "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, whatever form they may adopt to teach *or practice religion.*" (Emphasis added).

See also *Abington School District, supra* at page 230 (opinion of Douglas, J.).

The writings of James Madison have also been noted concerning State requirements leading to "some" cost:

> "That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." 2 Writings of James Madison 186 (Hunt ed. 1901) as cited by Douglas, J. in his dissent in *Allen* v. *Board of Education*, 392 U.S. 236, 266 (1968) and *Everson, supra* at 40 and 63 (dissent by Rutledge, J.).

The large number of amicus briefs filed in these cases demonstrates that adherents of various faiths take strong positions. *Walz, supra* at 670. Religious groups should, however, "spread their faith" without government aid or entanglement problems. *McCollum, supra* at 210. See also *Everson, supra* at 27 (dissent by Jackson, J.).

This Court has always warned that even relatively minor encroachments of the Establishment Clause may become major. As stated in *Abington School District* at 225:

> "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'It is proper to take alarm at the first experiment on our liberties.'"

II. The Court of Appeals Imposed a Far Too Strict and Unrealistic Standard and It Violated Rule 52(a) by Trying the Case de Novo.

The exceedingly strict standard imposed upon TWA by the court of appeals is far too severe. Moreover, the court of appeals followed a prevalent, but unwarranted, pattern in Title VII religious discrimination cases of violating the clearly erroneous provision of Rule 52(a) Fed.R.Civ.P. by trying the matter *de novo*.[29] Such a *de novo* procedure needlessly embroils courts of appeal in an unwise expenditure of the already too scarce commodity of judicial time. Litigants should be assured that the court that actually observes witnesses will decide credibility matters and that such decisions will be respected by the appellate court, particularly in cases concerning the terribly sensitive area of accommodation of another person's religious beliefs. Accordingly, this Court should exercise its supervisory powers to facilitate the proper judicial administration of the fundamental but differing roles of the appellate and trial courts by reinstating the district court's findings.

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29. Instances of courts of appeal making "clearly erroneous" findings are collected in footnote 26, *supra*. Because of the use of "overzealous" standards and the distinct tendency to embark upon *de novo* trials, the widely varying court decisions have not received critical acclaim. See, for example, the law review commentaries cited in footnote 10, *supra*.

The factual errors made by the court of appeals render it difficult to extract a definable standard, but this much is certain—it is virtually impossible for an employer to demonstrate that an actual accommodation without undue hardship could not be made, particularly if the employer is large. The term "reasonable" was read out of the statute. A strict standard of discrimination by effect was applied notwithstanding the applicability of a bona fide collective bargaining agreement which the union refused to vary; the reality of overtime costs (if overtime could even be obtained); work coverage and scheduling problems; employee morale and grievance problems; the special needs caused by TWA's continuous operation requirements; Hardison's frustrating voluntary transfer; the rights of other employees and the absence of any intent to discriminate or the presence of TWA's good faith effort to find a solution. The court of appeals is simply out of touch with the reality and needs of a secular industrial work force.

Judge Oliver held that the duty to accommodate did not require an employer to make every effort short of going out of business to permit his employees to stay on the job and also to observe their religion. In his view, "*reasonable* accommodation" . . . should be read with the term "undue hardship" (emphasis original) to arrive at the proper standard (A. 240). In fashioning that "proper standard," Judge Oliver found that the duty imposed upon employers or unions by Title VII was not, "a duty to impose hardships on the rest of his employees or members to accommodate the religious beliefs of a few" (A. 241). TWA's duty was to, "take affirmative action to try to find a way to permit the employee to observe his religion as he wishes, *as opposed to a duty simply not to intentionally discrim-*

inate" (A. 241, emphasis added).[30] Similarly, Hardison's voluntary transfer was viewed only "as a frustration of TWA's attempts to accommodate . . ." and not as an action which relieved TWA of its duty to seek further accommodation (A. 243). Judge Oliver also took cognizance of TWA's continuous operation requirements (A. 244) as well as understanding the problem of accommodating all employees as to their individual religious beliefs (A. 240). He rejected the concept of requiring TWA to incur overtime wages or leave other work areas uncovered because Title VII ". . . cannot be interpreted to require that companies finance employee's religious beliefs" (A. 244). He also found that the seniority provision prevented further accommodation and that in the "circumstances of this case" no violation of that provision was required (A. 228, 244). Finally, Judge Oliver referred to Title VII, 42 U.S.C. § 2000e-2(h) which permits differential treatment of employees, "based upon a bona fide seniority system" (A. 245). The seniority system was not designed to discriminate against religion nor did it act to lock members of any religion into a discriminatory pattern (A. 228, 229, 245).[31]

The court of appeals attempted to ignore the conflict created by the seniority system (A. 259-260). It, however, overlooked the express intent of Congress to exempt bona

30. The thrust of any valid congressional intent to avoid real religious discrimination could be effectively handled without the strict "effect" test applied by the court of appeals. Here, TWA had no intention to discriminate and it took much good faith affirmative action. No more should be required. See Edwards and Kaplan, *supra* at 637-641.

31. The district court's standard provided for union liability in an appropriate circumstance relating to the union's duty of fair representation (A. 221-232). That standard is a reasonable one and, from the employer's view, the union ought to be a mutual and equal partner in accommodating employee religious beliefs. Unilateral action by the employer is not desirable or reasonable.

fide seniority systems from the overall proscription of Title VII when it provided in Section 703(h):

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply * * * different terms * * * pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin * * *" 42 U.S.C. § 2000e-2(h) (1974).

Given the nondiscriminatory intent of TWA and the union and the applicable seniority system, TWA cannot be deemed guilty of religious discrimination unless the above language is rendered meaningless surplusage.[32] Moreover, in a collective bargaining environment in which the three concerned parties—TWA, Hardison and the union—all perceived in good faith, that any accommodation was limited by the collective bargaining agreement, whether an accommodation could be made is a finding of fact that is properly within the province of the trial court and should not be

32. TWA's position is consistent with *Franks, supra*, because no past pattern of discrimination is present and no "making whole" problems are involved. TWA's position is also consistent with *Dawson* v. *Mizell*, 325 F. Supp. 511 (E.D. Va. 1971) (no duty to override on part of Postal Service collective bargaining agreement covering 700,000 employees); *Johnson* v. *United States Postal Services*, 364 F. Supp. 37 (D.C. Fla. 1973), *aff'd* 497 F.2d 128 (5th Cir. 1974) (no duty to override). Compare with *Drum* v. *Ware*, 7 E.P.D. ¶ 9244 (W.D. N.C. 1974) and *Shaffield* v. *Northrup Worldwide Aircraft Services, Inc.*, 373 F. Supp. 937 (M.D. Ala. 1974) where efforts to swap were successful or else no efforts to accommodate were even attempted. The *Shaffield* court stated, at 942, that, "In some cases the existence of a seniority agreement might limit the freedom of an employer to effect the necessary reasonable accommodation." Similarly, in *Claybaugh* v. *Pacific Northwest Bell Telephone Company*, 355 F. Supp. 1, 6 (D.C. Oregon 1973), unlike here, no "union cooperation in solving this problem which affects both organizations" was explored.

second-guessed by the court of appeals. *Yott, supra* and *Cooper, supra* at 177 (opinion by Rives, J.). Thus, Judge Oliver's findings should have been accepted because there is no basis in the record to overturn them.

Application of Judge Oliver's proper standard to religious discrimination cases provides a far more workable and realistic standard than the court of appeals' overzealous approach. When coupled with the proper application of the clearly erroneous requirement of Rule 52(a), Judge Oliver's standard would have the salutary effect of providing a more uniform consideration of the elements heretofore deemed important, such as: (i) the fact that accommodation connotes a mutuality of effort on the part of the concerned employee to seek or, at the very least, not to frustrate an accommodation, *City of Albuquerque*, 9 E.P.D. ¶ 10,182 (D. N. Mex. 1975), *aff'd* ..... F.2d ....., 12 E.P.D. ¶ 11,244 (10th Cir. November 29, 1976); (ii) that employers must affirmatively seek union cooperation in finding a solution, *Claybaugh* v. *Pacific Northwest Bell Tel. Co.*, 355 F. Supp. 1, 6 (D.C. Oregon 1973); (iii) the consideration of an employer's own needs, particularly for "specialized" jobs or ones that require a flexible employee, *Reid, supra; Johnson* v. *United States Postal Service*, 497 F.2d 128 (5th Cir. 1974), *aff'g* 364 F. Supp. 37 (N.D. Fla. 1973); *Roberts* v. *Hermitage Cotton Mills*, 8 E.P.D. ¶ 9589 (D. S.C. 1974), *aff'd* 8 E.P.D. ¶ 9597 (4th Cir. 1974) and *United States* v. *City of Albuquerque, supra;* (iv) the imposition of hardships upon other employees including grievances and morale problems, *Williams* v. *Southern Union Gas Co.*, No. 75-1511, 529 F.2d 483 (10th Cir. 1976), *cert. den.* November 15, 1976; *Reid, supra; Kettel, supra;* (v) the applicability of bona fide seniority requirements, *Dawson* v. *Mizell*, 325 F. Supp. 511 (E.D. Va. 1971); and (vi) the ability to continue a once successful

accommodation, *Cummins, supra.*[33] All of the foregoing factors were carefully considered by the trial court.

There was no basis for the court of appeals determining that the district court's findings were clearly erroneous[34] and relegating TWA to the role of a "Pontius Pilate" (A. 254). The evidence is to the contrary. The people involved set out to assist Hardison as best they could within the confines of TWA's obligations to its other employees, its relationship with the union and its own reasonable work needs.

Kussman met with Hardison on three separate occasions (the union was present at two of the meetings) in an attempt to find solutions (A. 80, 117-123, 126-127). Kussman initiated one of the meetings after he, not Hardison, observed a work schedule requiring Hardison's presence on a Saturday (A. 69-72, 76, 126-127); TWA also granted, with union consent, Hardison special days off for unique religious holidays (A. 28-31, 81-82, 108); TWA's efforts in seeking swaps or job trades proved unavailing because Hardison's day off requirements were too "difficult to handle" and no one would "swap days off with him" (A. 28); TWA sought to accommodate by consenting to a variance of the seniority agreement. The union, however, would agree only to job swaps or trades that could be accomplished within the framework of seniority (A. 70, 77-78, 127); TWA authorized the union to search for a swap

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33. For review of other factors or requirements that have been considered relevant see the authorities cited in footnote 10, *supra*, and in particular 54 Tex. L. Rev. 616 (1976), *supra*; 9 Creighton L. Rev. 795 (1976), *supra;* and 45 U.M.K.C. L. Rev. 56 (1976), *supra*.

34. The court of appeals realized that the issue was one of whether the district court's findings were clearly erroneous (A. 251). The court of appeals simply "disagree[d] with both conclusions [reasonable accommodation and undue hardship]" (A. 256).

of shifts and it was the union steward's task to do so (A. 70, 77-78, 126-127, 157, 158, 238-245); and, at no time, did TWA express any animus toward Hardison's religious beliefs (A. 41).

Hardison recognized and appreciated TWA's efforts because on two occasions he wrote Kussman expressing thanks, ". . . for your sincere and understanding consideration and cooperation" (A. 28-29) and that, "I would like to thank you again for your sincere understanding and cooperation in this matter" (A. 29-31).

After observing and judging the credibility of the witnesses who were "on the line handling the problem" (R. 474), Judge Oliver found that, in sharp contrast to cases where no affirmative action was taken by the employer, "TWA established as a matter of fact that it did take appropriate action to accommodate as required by Title VII" (A. 243). The court of appeals' holding to the contrary, is a prime example of an appellate court trying a case *de novo* in contravention of Rule 52(a).

The court of appeals, in its *de novo* trial, somehow found, although it was not contended at trial, that TWA had accommodation alternatives available to it outside the restrictions of the seniority agreement (A. 259-263). That assertion ignores Hardison's own admission that if he were allowed to "bump out of slot," it necessarily would have meant that an individual who did not share his religious beliefs would be deprived of seniority rights (A. 114). Similarly, the granting of time off would be "usurping seniority" in another section (A. 125, 128). TWA simply could not require a senior employee to work in place of a junior employee and there were no circumstances under which job trades were made that disregarded seniority (Tr. 105, 137-143, 139, 210-217). Given such a record and having heard Kussman testify that he could "not require someone else to work in [Hardison's] place" (A. 135), Judge Oliver's finding that any further type of accommodation was not available (A. 243-245) cannot be deemed clearly erroneous.

The court of appeals asserted that three closely related alternative accommodations conceivably could have been made. First, TWA "could have permitted Hardison to work a four-day week" (A. 256). Second, TWA "could have" filled Hardison's job by "holding over", or "calling in early" another worker or "assigning" a worker from a "pool of 200 employees" even though overtime costs would be incurred (A. 258). Third, a "swap" could have been made (A. 259). Those "alternatives" are in direct conflict with Judge Oliver's findings. Mr. Kussman testified, without contradiction, that he could not simply permit a four-day work week because he needed regular employees and he had to avoid depriving other areas of work coverage or "usurping seniority" (A. 125, 127-128, 146, 153, 157, 244). Furthermore, the court of appeals ignored TWA's need to have a worker on Saturday. TWA's ability to "holdover", "call in early" or otherwise fill Hardison's job was constrained by its contractual agreement that:

> ". . . at overhaul bases, every reasonable effort will be made to arrange work schedules to allow Saturday and Sunday as regular scheduled days off . . .
>
> * * *
>
> Except in an emergency, an employee will not be required to work overtime against his wishes" (A. 215-216).

Because of the above contractual requirement and the general preference of high seniority employees not to work weekends (A. 104), it was necessary to have a regularly

scheduled employee available for Saturday work. Kussman could not be assured of getting overtime under any of the alternatives because of the emergency overtime clause and, if he did get overtime, it would be at premium wages (A. 125, 126, 128, 134, 135, 142, 216). Further, the undisputed evidence is that the need for an employee in Hardison's position was not like turning on and off a water tap because TWA's entire system had to be based on immediate responses to emergency situations (A. 75, 116, 125, 143, 153-156, 160-162). Otherwise, there would be no need for three shifts per day, 24 hours per day, 365 days of the year.[35] Moreover, the idea of forcing employees to resort to such hit and miss techniques to fill its jobs was rejected in *City of Albuquerque, supra.*

The court of appeals attempted to buttress its erroneous factual view by asserting that Hardison's need for accommodation was only for the temporary period of Wyatt's two-week vacation (A. 257). There is no evidence to support that position.[36] For example, the court of appeals con-

35. Common sense would seem to dictate that if a part-time worker were needed, a part-time worker would have been hired.

36. Hardison's problem was permanent and did not lessen when the junior man returned from vacation. Hardison's charge of employment discrimination recited that he was scheduled to work on his Sabbath when Wyatt left only for a two week vacation (A. 7). Hardison's own counsel elicited the testimony that Hardison was to replace Wyatt only on March 8 and March 15 (A. 69). Hardison did not report to work as scheduled on the next Saturday, March 22. Further, Hardison transferred to a twilight shift from which he left work after sundown on Friday, March 28, 1969. *A fortiori* if his problem was only because of the two week vacation, Hardison would not have transferred shifts. There was no doubt in the union's mind that Hardison simply was never going to work on a Saturday and that he had a "permanent problem, not a temporary problem" (A. 170-171 and 178).

The district court made the following explicit finding:

"After the meeting, but before the discharge hearing, Plaintiff changed his shift to the twilight shift, which permitted

(Footnote continued on following page)

tradicted its own suggestion by its subsequent assertion that Hardison's shift transfer (after missing *three* Saturdays) to the twilight shift would have reduced the accommodation impact upon TWA's operations (A. 257). The suggestion ignores the fact that Wyatt was no longer on vacation after Hardison missed the first two Saturdays or after Hardison's transfer. Moreover, the asserted reduction of impact ignores the foregoing facts concerning the need to have an available worker as well as the realities of industrial plants such as TWA's overhaul base.

Contrary to the court of appeals mistaken belief, TWA made attempts to secure a "swap". The district court's findings on that issue are amply supported (A. 238-243). For example, it was TWA that initiated meetings to find a solution and agreed to waive the seniority provision (A. 70, 71, 110-112, 125-216, 145-146). The union, however, refused to violate the seniority rights of other employees. In Hardison's own words, the union "stipulated that [any swap or change] had to be through the seniority system" (A. 108) and that the union would allow a changing or swap of shifts only if, "I could bid into something else" (A. 111). As noted above, the record is clear and in-

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him to have Saturdays off. The testimony was that the union believed at this time that its problems were solved (Tr. 391). But on March 28, 1969, Plaintiff quit work at sundown and it became immediately apparent that the union would not be able to argue that Plaintiff should not be dismissed because his conflicts had been resolved (Tr. 391-392)." (A. 230).

Significantly, nowhere in Hardison's suggested findings of fact was it argued that his problem was a temporary one (Tr. A. 82-113). See footnote 4, *supra*. Moreover, it if were only a temporary problem, surely Hardison could have worked as he voluntarily did for premium overtime pay after he first told Kussman in April of 1968 that he "sincerely believed" no work could be done on his Sabbath (A. 28, 74).

disputable, as Hardison conceded, that a "swap" was subject to the seniority rights of other employees and that if he bumped out of slot, employees not sharing Hardison's religion would be deprived of seniority (A. 114).

Despite TWA's seeking union help, the court of appeals construed TWA's contact with the union as, "clear that TWA did not seek and the union, therefore, did not refuse to entertain a possible variance" (A. 260-261). With all due respect, it is surely an Alice-in-Wonderland world where words and actions have no meaning if TWA's conduct is construed as anything other than seeking a variance for Hardison.

The district court, on the other hand, found that, ". . . this case is a perfect example of a situation in which *a union* could accommodate a member if required to do so. *TWA agreed* that plaintiff could change shifts if the union approved" (A. 224, emphasis added).

Moreover, the court of appeals requires TWA "* * * to find one [a swap] or obtain union approval" (A. 259, n. 10). It is evident that nothing would comply with the court of appeals' standard short of an actual accommodation.

The court of appeals also implies that TWA should not have relied upon the union steward to seek any possible job swap (A. 259). In reality, TWA, like most other large industrial employers, must rely upon the union to align seniority rights with the work schedule (A. 106, 127, 138, 158). The steward performs such tasks to avoid any element of employer coercion in respect to "voluntary" job swaps or shifts. Unions and management are both rightfully hesitant for management to be in the position of

coercing trade-offs. See, for example, *City of Albuquerque, supra.*[37]

The court of appeals is also factually mistaken in its reference to the Union Relief Committee (A. 261). That committee dealt only with temporary, not permanent, problems (A. 143-145, 170-171, 180). Further, that committee is not, in any sense, governed or run by TWA (A. 121). It would be Hardison's or the union's responsibility to resort to the committee but there is no evidence that he did so. Compare with *City of Albuquerque, supra,* where the court sanctioned the concept that the concerned employee must seek his own trades.

The court of appeals erroneously implies that TWA had not accommodated other employees with similar religious problems (A. 261). While Hardison was the only case in the Stores Department (A. 141), TWA had been able, as the district court so found, to accommodate other such problems in the same manner as it approached Hardison's problem (A. 154).

The court of appeals misconstrued the record in finding that TWA conceded that there were over "200 available workers" (A. 256) and that TWA could have assigned a worker from that "pool" (A. 258). TWA made no such concession and the evidence belies the notion that any such "pool" existed. The number of employees scheduled to work on weekends was limited by the labor contract (A. 215-216) and employees with high seniority preferred not

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37. The *City of Albuquerque* decision is significant in that the district court relied upon Judge Oliver's opinion and, on appeal, the Court of Appeals for the Tenth Circuit did not follow the reversal of Judge Oliver's opinion by the Court of Appeals for the Eighth Circuit. Judge Oliver's opinion was also relied upon in *Dixon* v. *Omaha Public Power District,* 385 F. Supp. 1382 (D. Neb. 1974) and *Cook* v. *Mountain States Telephone and Telegraph Company,* 397 F. Supp. 1217 (D. Ariz. 1975).

to work on weekends (A. 104). Thus, on weekends, TWA had a greatly reduced work force of only four people on Hardison's shift (A. 156) and only 15 to 40 workers were in the entire job area (A. 120, 156). More importantly, Hardison was the only person scheduled to perform his essential job (A. 75, 125, 156). The number of 200 employees is really meaningless and one could just as well point a figure of 500 or, indeed, the 37,500 employees TWA had. In fact, the number 200 came about from a question by the district court which *assumed* that the strictures of the seniority system were not present (A. 134-135).

Again, the court of appeals erred in stating that the costs which TWA would incur from overtime is not "clear from the record" (A. 258). That assertion cannot stand in the face of the undisputed testimony that overtime would be one and one-half to double time and stipulation regarding the rates of pay (A. 21, 125 and 216).[38]

The court of appeals casts a deaf ear upon TWA's other employees who might have grievances resulting from Hardison being granted an unapproved union swap out of seniority (A. 261). The district court, however, found that it would have been an undue hardship for TWA, which was a party to a bona fide seniority system, to change plaintiff's shift in violation thereof (A. 244). The evidence supports Judge Oliver's finding because grievance and morale problems would arise (A. 159, 164). Moreover, TWA's employees regarded seniority as an important and serious right (A. 163) as evidenced by the number of seniority related grievances TWA receives (A. 163) and by some union members regarding seniority as being as important as religion (A. 114). The court of appeals dis-

38. Significantly, nowhere in Hardison's suggested findings of fact was it argued or suggested that the cost was not determinable from the record (Tr. App. 82-112).

agreed upon the ground that TWA had a large labor force and had not yet been "inundated with similar demands" (A. 257, n. 8).

A review of Judge Oliver's carefully conceived standard and his documented opinion indicates that it is a total "surprise" that his findings could be found clearly erroneous.[39] The court of appeals did not observe Hardison attempting to explain away his voluntary Saturday work at premium rates after he had told Kussman, ". . . *I sincerely believe* this is the Sabbath" (A. 28, emphasis added); his voluntary transfer to a shift more convenient to him; or his refusal to cooperate with the union in presenting a grievance on his behalf. Nor did the court of appeals have the opportunity to observe Mr. Kussman describe his respect and concern for Hardison's religious beliefs; his attempts to find a solution fair to all employees and yet preserve TWA's relationship with a union that would not violate the seniority agreement; his need to have someone on the job to be available in the event of emergencies; the difficulty of obtaining "emergency" overtime under the collective bargaining agreement and the need to have coverage in all work areas. Nor did the court of appeals see and observe Mr. Stone describe the need for uniformly applied work rules in TWA's large system, the chaos that would result if all religious beliefs were accommodated, the large number of grievances TWA incurred because of seniority and the needs of TWA's continuous business. Nor did the court of appeals observe the testimony of the other witnesses.

39. See the discussion in footnote 26, *supra* of *Draper*, *supra*. Compare the courts of appeal decisions in *Draper* and *Hardison* with the opposite approach of properly deferring to the district court findings expressed in *City of Albuquerque*, *supra*, *Johnson*, *supra* and *Roberts*, *supra*.

The court of appeals mistook its own duty. The proper duty of an appellate court was expressed by the court of appeals for the Tenth Circuit in *City of Albuquerque, supra*. In respect to a virtually identical factual context, that court of appeals stated:

> "We regard the trial court's several conclusions as to 'undue hardship', as well as its earlier determination of 'reasonable accommodation', to be essentially findings of fact. On review such should not be rejected unless they are clearly erroneous. In our review, such are not clearly erroneous and hence should be upheld.
>
> • • •
>
> . . . Under the facts and circumstances here present, if we reversed the trial court we would simply be substituting our best judgment of the facts for that of the trial court. This we should not do. Indeed we cannot." (12 E.P.D. *supra* at pp. 5764-5765.)

Finally, the most bizarre and contradictory aspect of the court of appeals' opinion is that the unions escape liability upon the highly technical ground that the briefs and oral argument were directed to the breach of duty by TWA (A. 263).[40] It was the unions, not TWA, who refused to vary the seniority agreement. There is no justice in holding TWA liable when it had no intent to discriminate and when it took affirmative action to accommodate.

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40. The unions filed responsive briefs and actively participated in oral argument before the court of appeals just as they are doing in this Court.

CONCLUSION

For the foregoing reasons, Trans World Airlines, Inc., the petitioner, respectfully submits that this Court should reverse the judgment of the court of appeals, and remand with instructions that Hardison's complaint be dismissed without liability to TWA.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 75-1126 and 75-1385

TRANS WORLD AIRLINES, INC., *Petitioner*
and
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT 142, AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS LOCAL LODGE 1650, *Petitioners*
v.
LARRY G. HARDISON, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL., PETITIONERS

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Black's Law Dictionary (Fourth Edition) 68
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Edwards and Kaplan, Religious Discrimination and the Role of Arbitration Under Title VII, 69 Mich. L. Rev. 599, 628 (1971) 12
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Pfeffer, God, Caesar and the Constitution (Beacon Press, Boston, 1975) 58, 59, 79

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

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and
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LARRY G. HARDISON, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL., PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals is reported at 527 F.2d 33 (8th Cir., 1975), and reproduced at pages 246-266 of the Appendix. The memorandum and order of the district court is reported at 375 F. Supp. 879 (W.D. Mo., 1974), and reproduced at pages 218-245 of the Appendix.

JURISDICTION

The opinion of the court of appeals was entered on December 16, 1975. A timely petition for writ of certiorari was granted by this Court on November 15, 1976.[1] By letter dated December 16, 1976, the Clerk of this Court extended the time within which petitioners' briefs in this case and in No. 75-1126 must be filed to and including January 15, 1977. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the statutory prohibition against discrimination on account of religion, imposed on employers and unions by Sections 701(j) and 703 of Title VII of the Civil Rights Act of 1964, as amended, may, consistent with the purposes and intent of Title VII and with the constraints of the Establishment Clause of the First Amendment, be construed to require the parties to a collective bargaining agreement to accord special privileges to Sabbatarians and others because of their religion which deprive contract beneficiaries of non-discriminatory seniority and other rights guaranteed by the agreement.

STATUTES AND REGULATIONS INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.*, provides in pertinent part as follows:

Sec. 701. For the purposes of this title . . .

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he

[1] On the same day the Court granted the petition of Trans World Airlines in No. 75-1126, a companion to this case, and ordered the cases consolidated.

is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

. . .

Sec. 703. (a) It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . ;

. . .

(c) It shall be an unlawful employment practice for a labor organization

(1) to exclude or expel from membership, or otherwise to discriminate against, any individual because of his . . . religion . . . ;

(2) to limit, segregate, or classify its membership . . . or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's . . . religion . . . .

. . .

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . , provided that such differences are not the result of an intention to discriminate because of . . . religion . . . .

. . .

(j) Nothing contained in this title shall be interpreted to require any employer [or] labor organization . . . to grant preferential treatment to any individual or to any group because of the . . . religion . . . of such individual or group on account

> of an imbalance which may exist with respect to the total number or percentage of persons of any . . . religion . . . employed by any employer [or] admitted to membership or classified by any labor organization . . . in comparison with the total number or percentage of persons of such . . . religion . . . in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

The Guidelines of the Equal Employment Opportunity Commission with respect to religious discrimination, 29 C.F.R. § 1605.1, provide in pertinent part as follows:

> . . .
>
> (b) The Commission believes that . . . section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees . . . where such accommodation can be made without undue hardship on the conduct of the employer's business.
>
> (c) . . . [T]he employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

STATEMENT OF THE CASE

1. Background

Respondent Larry G. Hardison, plaintiff in the district court, was employed by Trans World Airlines (TWA) on June 5, 1967 as a Stores Clerk in Building No. 1 at TWA's Kansas City Overhaul Base, Kansas City (Missouri) International Airport (A. 22, 23).[2]

[2] References are to the Appendix filed with the Court. Where appropriate, references to findings of fact made by the district court appear first, and are set off by semicolon from references to the record evidence which support them.

He was terminated by TWA, in the action from which this suit arises, on April 2, 1969 (A. 22).

TWA's Kansas City Overhaul Base is the Company's principal aircraft maintenance facility, with all airframe and engine overhaul and major maintenance work on TWA's aircraft being performed there, along with similar maintenance which TWA performs under contract with approximately thirty other airlines (A. 23, 59). To meet these obligations the Kansas City Overhaul Base operates on a round-the-clock, seven-days-a-week schedule year round (A. 23, 116).

At the time Hardison was employed by TWA and at all times pertinent to this action, the nonsupervisory mechanics and related employees at the Kansas City Overhaul Base, including Hardison, were represented for collective bargaining purposes by Local Lodge 1650 and District Lodge 142 of the International Association of Machinists and Aerospace Workers, AFL-CIO (A. 22, 25-27). Throughout the entire period pertinent to this action, the terms and conditions of employment for persons employed in the bargaining unit into which Hardison was hired were those specified in a collective bargaining agreement entered into between TWA and the IAM&AW petitioners[3] and dated August 25, 1966 (A. 22, 210-218). That contract, discussed in greater detail *infra* (pp. 8-10, 26-29), in general required that, among bargaining unit employees, "all reductions or increases in force, preference of

[3] Distinctions between the role and responsibilities of Local Lodge 1650, District Lodge 142, and the parent body, the International Association of Machinists and Aerospace Workers, AFL-CIO, are immaterial to the issues under review here. For convenience, the petitioner Unions are hereafter referred to collectively as "the Union."

shift assignment, vacation period selection, . . . bidding for vacancies or new jobs, and . . . all promotions, demotions, or transfers involving classifications covered by this Agreement," were to be made in order of seniority (A. 214).

At the time Hardison applied for employment with TWA, he indicated on his application that he would be willing to work "shifts, including weekend" (A. 25), and until September or October of 1968, Hardison did, in fact, work on Saturdays when required (A. 73-74). He worked, at various times, on both the twilight shift (3:30 p.m. to 11:00 p.m.), and the graveyard shift (11:00 p.m. to 7:00 a.m.) (A. 66-67).

2. Circumstances Leading to Hardison's Discharge

In the spring of 1968, Hardison began to study the teachings of the Worldwide Church of God (A. 66), one of which requires honoring the Sabbath, observed from sunset Friday to sunset on Saturday (A. 67), by refraining from the performance of any work during that time. By September or October of 1968 (A. 72-74), Hardison had decided to accept and follow the teachings of the Worldwide Church of God, and thereafter he was no longer willing to work on the Sabbath, or on the religious holidays observed by his Church.[4] Hardison initially was able to accommodate his religious beliefs to the demands of his job by exercising his

[4] Seven such holidays are observed throughout the year, none of which occur on fixed calendar dates (A. 25). TWA was prepared to permit Hardison to miss work on his religious holidays, provided he was willing to work on the contractually specified holidays (A. 120, 137-138). The Union was amenable to this arrangement, since it would not have required violation of any provision of the contract (A. 59, 138). The controversy giving rise to this suit did not involve a holiday observance however (A. 124).

accumulated seniority right to bid for a shift assignment compatible with his religious obligation to refrain from Sabbath work. Thus in early October, 1968, Hardison bid for and was assigned to a Sunday through Thursday graveyard shift in the Building 1 Stores Stock Room. In this assignment, his five-day week started at 11:30 p.m. on Sunday and ended at 7:00 a.m. on Friday (A. 29, 66). In December of 1968, however, Hardison again exercised his contractual seniority right to bid for and receive a new assignment, this time to the day shift in a different area (Stores Progress Section in Building 2) (A. 67-68). That move, from the Stores Stock Room Section in Building 1 to the Stores Progress Section in Building 2, put Hardison into a different seniority group in which he became the second most junior person in relative seniority standing (A. 229; 74-75). Hardison's new assignment—to the day shift Monday through Friday—still enabled him to reconcile his work schedule with his religious obligations, since his work week now ended at 3:30 p.m. on Friday (A. 68). His relatively low seniority standing in Building 2, however, made Hardison more vulnerable to being involuntarily rescheduled to cover for other employees' authorized absences than he had been previously (A. 227; 75-76), as he recognized (A. 103-105).

Three months after he transferred to the Building 2 day shift, Hardison found himself in exactly that situation. In early March, 1969, the only man who was junior to Hardison on that seniority roster went on vacation, and under the established contractual seniority and shift assignment rules Hardison would have been obliged to take the junior man's place for the duration of his vacation (A. 60). Inasmuch as the junior man's work assignment was Thursday through

Monday on the day shift, Hardison would have been required to work during the day on Saturday, a requirement he found offensive to his religious beliefs (A. 68).

During the period in 1968 when Hardison first began to study the teachings of the Worldwide Church of God, he had made his supervisors aware of the potential conflict between his job schedule and the beliefs of that church (A. 27-31, 117-124). Consequently, when the vacation rescheduling arose in March of 1969, TWA's Manager of Stores Systems at the Kansas City Overhaul Base, Mr. Everett Kussmann, realized that the proposed vacation schedule would create a problem for Hardison. Shortly before the first Saturday on which Hardison was scheduled to work, Kussmann met with Hardison and James Tinder, a representative of Local Lodge 1650, IAM&AW (A. 229; 31, 126). At that meeting, the purpose of which, according to Kussmann, was "to make sure that we had no misunderstanding" about what Hardison's obligations were (A. 126), the three men discussed possible ways by which Hardison might avoid having to meet his pending Saturday shift assignment. Kussmann on that occasion suggested that Hardison's religious needs might be met "by [Hardison] exchanging with an employee within the section or seniority grouping" (A. 127) or that Hardison "might be able to . . . exchange with someone in another seniority grouping" (A. 127). Both of those expedients would have implicated the contractual seniority system. The Union at the time was willing to permit Hardison to move to any assignment or shift which would not require work on Friday night or Saturday, provided the assignment was put up for bid and Hardison was the senior employee to bid into it (A. 83-85,

126-128). The Union was "totally agreeable to any adjustment that could be made for [Hardison] as long as it didn't deprive another employee of . . . seniority rights" (A. 91). After exploring all possible alternatives, the Union official attending the meeting concluded that there were none which would not violate the contract rights of other employees (A. 229; 77, 84, 91-92).

Hardison himself had two suggestions. First, he was willing simply to skip his Saturday assignments, with an appropriate reduction in his pay. That option was unacceptable to the Company (A. 229; 127-128) because, as Mr. Kussmann testified, Hardison's job would have to be filled, either by assigning a man from another section, thus leaving another function unperformed, or by having someone from another shift work overtime. This latter solution was thought unreliable because, under the contract, overtime work cannot be compelled except in an emergency situation (A. 127-128). Second, Hardison claimed to know of a person then assigned to the "graveyard" shift who was unhappy with that assignment. He proposed that a simple swap of shift assignments between himself and the "graveyard" employee be arranged, but again, the Union was willing to acquiesce in such an arrangement only if Hardison's seniority had been sufficient to entitle him to "bump" into it (A. 83-84). Otherwise the "swap" would adversely affect the seniority right of persons senior to the would-be transferee who held assignments which would not advantage Hardison (A. 84-85). In fact, however, there was no job up for bid in early March to which Hardison might have transferred (A. 229; 92-93). And even if there had been a vacancy in a job which would have alleviated Hardison's problem, he

could not have been assigned to it without depriving "a more senior employee * * * of his seniority rights" (A. 84-85, 91-92).

The meeting thus ended without success; no method could be found for relieving Hardison of his Saturday assignment which would not (1) require TWA to operate with either Hardison's job or some other job being unperformed on Saturday, or (2) require some other employee to give up either a department or shift assignment, or the right to refuse overtime work, which the collective bargaining agreement guaranteed him (A. 96).[5] Hardison nevertheless declined to work his scheduled shift for three successive Saturdays, March 8, 15, and 22, 1969 (A. 31, 77-78), and was terminated by TWA for those absences. By the time of the Company hearing at which the formal decision to terminate Hardison was made, the problem which had begun as a temporary, vacation schedule problem, had become permanent by virtue of Hardison's voluntary transfer to a twilight shift and his refusal to work his full scheduled Friday shift on March 28 (A. 230; 170-171). This lawsuit followed.

3. Proceedings Below

Hardison, having first invoked the administrative remedy provided by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, brought this action in the district court on February 10, 1972, asserting jurisdiction under Section 706 of Title VII, 42 U.S.C.

[5] It is undisputed that Hardison's predicament was in no way—either direct or remote—the result of any intention on the part of Company or Union to discriminate against him on account of his religion, or of any past conduct undertaken with such purpose or having such effect (A. 227; 41-42, 97, 128).

§ 2000e-5. He charged both TWA and the Unions with violating rights granted him by Title VII, alleging in substance that his discharge by TWA constituted discrimination on account of his religion, and charging in his complaint that the Unions "cooperated, acted in concert, and assisted" (A. 4-5) TWA in that action, all in violation of Title VII of the Civil Rights Act of 1964.[6]

After a trial in which much of the factual record was stipulated, the district court ruled that Sections 703 (a) and (c) of Title VII, 42 U.S.C. § 2000e-2(a) and (c), and valid Regulations of the Equal Employment Opportunity Commission interpreting the statute required both employers and unions to make "reasonable accommodations to the religious needs of employees . . . where such accommodations can be made without undue hardship on the conduct of the employer's business." 29 C.F.R. § 1605.1. The court further ruled, however, that, on the facts of this case, both the Union and TWA had satisfied the legal obligations owed Hardison, and ordered entry of judgment for all defendants.

Specifically, the court characterized Hardison's claim against the Union as an assertion "that the union dis-

[6] Prior to March 24, 1972, Title VII did not define the term "religion" as used in Section 703. The Equal Employment Opportunity Commission had, in 1966 and again in 1967, issued Guidelines purporting to define the statutory prohibition on religious discrimination. The 1967 Guidelines, appearing at 29 C.F.R. § 1605.1 (p. 4, *supra*), were found by both the district court and the court of appeals to be applicable in this case. The Equal Employment Opportunity Act of 1972 added what is now Section 701(j), 42 U.S.C. § 2000e(j) to Title VII, substantially incorporating the language of 29 C.F.R. § 1605.1 into the Act's definition of religion.

criminated against him because of its failure to refuse to comply with the seniority provisions of the collective bargaining agreement between TWA and The International which governed plaintiff's employment. A violation of those provisions would have been required in order to adjust his schedule with one of the other workers on his shift so that he would be able to observe his Sabbath" (A. 222-223). The court thus saw the question posed as "whether Title VII imposed upon the unions the duty to ignore their contract under the circumstances of this particular case" (A. 224). In an analysis which, while not so denominated, drew heavily on First Amendment principles (see II, *infra,* pp. 48-79), the court concluded that to read the applicable EEOC guidelines as requiring "the employer in every case to shift an employee out of seniority to accommodate religious beliefs[]" would constitute the imposition of " 'a priority of the religious over the secular' (A. 226) . . .[7] and would perhaps raise constitutional questions [citation omitted]" (A. 226). The court concluded from this analysis that "it would have been an undue hardship for the unions to have changed plaintiff's shift in violation of the seniority provisions of the . . . contract" (A. 226).

The court believed this conclusion was buttressed by the protection Congress had provided in Section 703(h) of Title VII for "bona fide seniority systems," see 42 U.S.C. § 2000e-2(h). The court observed that, as consistently interpreted by appellate courts, Section 703(h) does not protect a seniority system which "perpetuates the consequences of past discrimination. In

[7] Quoting from Edwards and Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII,* 69 Mich. L. Rev. 599, 628 (1971).

other words, a seniority system is not lawful if it freezes Negroes into past patterns of discrimination" (A. 227). The court found no contention, however, and no record basis on which a contention might have been supported, "that the seniority system in this case locked in any discrimination against individuals of plaintiff's or anyone else's religion. The seniority system was not designed with the intention to discriminate against religion nor did it act to lock members of any religion into a pattern wherein their freedom to exercise their religion was limited" (A. 227). To summarize, the district court found no evidence that the collectively bargained seniority system which governed job and shift assignment, and selection of days off, in Hardison's bargaining unit operated in any way to perpetuate any employment disability suffered by Hardison as a result of past discrimination against him on account of his religion. The court further found that, absent any such perpetuating effect linked to previous invidious discrimination, the contractual seniority system was protected by Section 703(h), and that any interpretation of the applicable guidelines which required invasion of that protection, for the sole purpose of facilitating Hardison's practice of his religion, would be of questionable constitutional validity. Thus, construing the guidelines in a way which would *not* require abrogation of contractual seniority rights, the court found that the Unions had satisfied the obligation imposed on them and dismissed the complaint as to them (A. 228-232).

With respect to TWA, the court alluded to the various efforts made by management representatives to satisfy Hardison's needs. The court concluded that TWA had done all it reasonably could have, short of

either "simply allow[ing] plaintiff to take his time off and attempt[ing] to replace him, or . . . forc[ing] another employee to change shifts" (A. 243-244). Again drawing implicitly on First Amendment principles, the court held that the first of these options was not required by the Act and Regulations because "Title VII cannot be interpreted to require that companies finance employees' religious beliefs" (A. 244), and that the second was not required because "Title VII does not force TWA to impose upon other employees because of one employee's religious belief" (A. 244). On this analysis, the court ruled that TWA had satisfied its duty under the Act, and dismissed the claim against the company.

The court of appeals reversed the judgment in favor of TWA. Recognizing that the case had been tried "on primarily stipulated facts" (A. 250) and that the "factual background of [the] litigation is not disputed" (A. 247), and "rely[ing] heavily upon the findings of the District Court" (A. 247), the court nevertheless rejected the district court's conclusion "that TWA had made a reasonable effort to accommodate Hardison's religious beliefs and that the alternatives rejected by TWA would have created an undue burden on TWA's business" (A. 256). The court reached this result by identifying several "alternatives" which it found to have been available to TWA "[w]ithin the framework of the collective bargaining agreement . . ." (A. 256). Among these, in the court's view, was the option to permit Hardison to work a four-day week. The court held that TWA would have been obligated to exercise this option even though to do so might have required utilization of a supervisor or transferring another worker on duty elsewhere to fill Hardi-

son's slot, and even though such transfer might have "cause[d] some other shop function to suffer" (A. 256). Alternatively, the court found that, "within the framework of the collective bargaining agreement" TWA could have filled Hardison's Sabbath shift "from other available personnel. This could be accomplished by holding a worker over from the last shift, calling a worker in early, or, more logically, assigning a worker from the pool of 200 employees qualified to do the work" (A. 257-258). That this would require TWA to pay overtime was held immaterial. "The [EEOC] regulation does not preclude some cost to the employer anymore than it precludes some degree of inconvenience to effect a reasonable accommodation" (A. 258). Concluding that TWA was required to, but had not, considered these alternatives, the court held that TWA's "burden of proof has [not] been met in this case" (A. 259).

Finally, the court of appeals rejected TWA's challenge to the constitutionality of the statute. However, while purporting to "agree with the District Court's conclusion" in this respect (A. 266), the court failed to recognize that the district court's conclusion was necessarily based on its own construction of the statute and Guidelines, a construction which the court of appeals rejected.

On the ground that the conclusions which led the district court to dismiss as to the Union "are not directly challenged upon appeal" (A. 263), the court of appeals affirmed entry of judgment in its favor (A. 266). But it made clear its position that (A. 260), "a collective bargaining agreement, the seniority provisions of which preclude *any* reasonable accommodation for religious observances by employees, is *prima facie* evidence of union and employer culpability under the Act."

SUMMARY OF ARGUMENT

I. Title VII does not require the sacrifice of seniority and other employee rights by those who are non-Sabbatarians to facilitate religious observances of Sabbatarians. The court of appeals' contrary conclusion is refuted by the language and legislative history of Title VII, standing alone, and even if the question were closer than it is, that conclusion would have to be rejected because reading Title VII to create a preference for one employee over others on the basis of the former's religious beliefs and practices would require that the Act be declared unconstitutional under the First Amendment. Accordingly, there "comes into play [the canon of construction] that when a statute is ambiguous 'construction should go in the direction of constitutional policy.' " *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 134 (1974).

If a company requires the services of employees on Saturday, some of its employees will have to work that day. If that assignment is considered undesirable, the employer, or if the employees are represented by a union, the collective agreement, will have to state the method for determining who shall be required to fill that undesired assignment.

The point of Title VII is that the assignment rule used, in form and in operation, must provide all employees, regardless of their race, color, religion, sex or national origin the same chance to avoid this undesirable work. "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs* v. *Duke Power Company,* 401 U.S. 424, 431 (1971). We can see no escape from the logic of the proposition that requiring

individuals who do not espouse any religion, or a religion that does not regard Saturday as the Sabbath, to do all the undesired Saturday work, and excepting individuals who do espouse a Sabbatarian religion from that undesired work, is the very "discriminatory preference for * * * [a] minority * * * group" which § 703 in terms prohibits.

Griggs is the only Title VII decision of this Court cited by the court below. But whatever the limits of *Griggs'* so-called "effects" test may eventually prove to be (see *General Electric Co.* v. *Gilbert,* — U.S. —, 45 L.W. 4031, 4034), the first limiting principle on the doctrine there announced is apparent from the decision itself. Consistent with Title VII's prohibition of both discrimination against and preferences for any group, *Griggs'* holding does not sanction an advantage for minorities because of their status as such, nor does it impose a detriment on the majority *qua* majority. Rather, the Court emphasized that "the Act does not command that any person be hired simply because * * * he is a member of a minority group." *Id.,* at 430-431.

Here, of course, the Court of Appeals did not conclude that Sabbatarians were denied an equal opportunity to avoid Saturday work; instead, it read Title VII to mandate rules that exempt Sabbatarians from all Saturday work and require only non-Sabbatarians to work on Saturday. It thereby deprived senior non-Sabbatarians of the right they earned by their past labor to choose whether or not they wish to work on Saturday. That result is precisely contrary to the equal opportunity purpose of Title VII, as stated in the Act itself, and as implemented by this Court in *Griggs.* For, to exempt Sabbatarians from Saturday work is to ignore the lesson of *Griggs* that the statutory prohibition against discrimination forbids giving

any advantage to any individual "because of such individual's race, color, religion, sex or national origin."

In interpreting § 703 of the 1964 Act as requiring TWA to give preference to Hardison's desire not to work on Saturday over the same desire of senior employees whose motivation was not religious, the court of appeals misread the 1967 EEOC Guidelines and misconstrued what Congress did in 1972 in adding § 701(j) to the Act. The 1967 EEOC Guidelines do not in terms impose such a requirement and there is no evidence that such an obligation was in the contemplation of the 1972 Congress which added § 701(j) to the Act.

The EEOC's first Religious Discrimination Guidelines, issued June 15, 1966, required employers to accommodate the reasonable religious needs of employees. In one of several examples illustrating the scope of that requirement, those Guidelines expressly provided that "an employer is not compelled to make such an accommodation at the expense of serious inconvenience to the conduct of his business or disproportionate allocation of unfavorable work assignments to other employees." These Guidelines were replaced on July 10, 1967. The 1967 Guidelines do not in terms require that the desires of the Sabbatarians be permitted to override those of other employees. Nor do the changes in the 1966 regulation call for such an interpretation. By elevating the standard by which the employer's failure to accommodate will be justified (from "serious inconvenience" to "undue hardship"), and by shifting the burden of proof with respect to justification to the employer, the 1967 Guidelines undoubtedly increased the number of cases in which an employee would be able to make out a case of discrimination, but neither change

even suggests that a preference among employees was contemplated. Nor can elimination of the illustrative example respecting the impact on other employees lead to any inference, because the 1967 Guidelines eliminated *all* the illustrative examples in the 1966 Guidelines, including illustrations of unlawful conduct which the change clearly was not intended to legalize.

Even if the court of appeals' construction of the 1967 Guidelines is accepted, however, standing alone they would be entitled to little, if any, weight, inasmuch as they conflict with the EEOC's earlier pronouncements and with the basic anti-discrimination philosophy of the Act. Cf. *General Electric* v. *Gilbert*, ... U.S. ...., 45 L.W. 4031, 4035-4037 (Dec. 7, 1976).

But, is it argued, by adding to the Civil Rights Act § 701(j), which incorporates a substantial part of the language of the 1967 Guidelines, Congress ratified those Guidelines. On that premise, the question presented is whether the 1972 Congress intended to prefer religious believers to other employees when their interests conflict, as when *someone* must unwillingly work on Saturday. We submit that Congress did not so intend.

Section 701(j) does not in terms support the Court of appeals' construction. This alone is decisive, for absent clear and unambiguous statutory language, it may not be assumed that Congress intended a result which 1) raises serious problems under the Establishment Clause; 2) is such a sharp departure from the equal treatment concept of discrimination in Title VII; and 3) would render § 701(j) a partial repeal of

§§ 703(h) and 703(j) which respectively preserve *bona fide* seniority systems and prohibit preferential treatment of any racial or religious group.

Nor does anything in the sparse legislative history of § 701(j) show that Sen. Randolph, its sponsor, or the other members of the 1972 Congress, understood it to enact a preference for one group of employees over another. Sen. Randolph certainly did not say that this is what he intended to accomplish. Indeed, there is no indication that Sen. Randolph intended that § 701(j) should give employees greater protection against private employers than they have against the government under the First Amendment, which he invoked.

The Conference Report gives no support to the court of appeals' interpretation of § 701(j). While the Report approved the 1967 Guidelines, it gives no indication as to what Congress thought that those Guidelines meant, let alone that they meant what the court of appeals in this case said they mean. The Report's reference to *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 325 (6 Cir., 1970), affirmed by an equally divided Court, 402 U.S. 689 (1971), is ambiguous, for that decision assumed the validity of the regulation but nevertheless held for the employer. But if the decision is understood as intending to reverse the result in *Dewey,* it would still not justify the result reached by the court below in this case. For, in *Dewey,* the employer had refused even to determine whether there were other employees who would *willingly* substitute for the employee whose religious beliefs conflicted with his working on his Sabbath, although substitution was permissible under the collective bargaining contract as interpreted and administered in that case, 429 F.2d at

329. Disapproval of an interpretation of Title VII which does not even require that much accommodation does not imply approval of a requirement that unwilling employees be conscripted to work in favor of Sabbatarians.

II. As construed by the court below, Section 701(j) offends Establishment Clause aims in five respects: (1) it creates a discriminatory preference for religious over secular reasons for absence from work; (2) it facilitates religious activity for its own sake by removing non-discriminatory work barriers; (3) it taxes employers and employees to support religious practices of others by imposing upon them forfeiture of rights, expense and hardship; (4) it entangles employers, unions, a government agency and the courts in determination of religious questions; and (5) it divides the work force politically along religious lines. Moreover, it does all this without a secular purpose, which is the *sine qua non* of confronting Establishment Clause objections.

A secular purpose cannot be attributed to the Amendment as construed on the theory that it implements the Title VII guarantee against discrimination, for what it actually does is create a preference for religious observers to the detriment of non-observers and thereby discriminates *in favor of* religion. Nor can a secular purpose be divined on the theory that the Amendment promotes "free exercise values". As applied to the construction placed upon the Amendment by the court below, the premise underlying that theory necessarily is that "free exercise values" import an obligation on the part of others to assume burdens and expense, and to sacrifice their own contract rights and liberties, to facilitate religionists' observance. That premise cuts

against the grain of the most fundamental tenets of our jurisprudence.

Nor can it be argued that facilitation of religious observance is an "indirect," "remote" or "incidental," rather than the "primary," effect of the Amendment, for the face of the legislation as well as its history show that Congress' only purpose was to facilitate religious observance by Sabbatarians. Like a tax credit to parents who perform a religious duty by sending their children to parochial school, the "accommodation" requirement is but the means to the forbidden end—promotion of religious observance.

The Amendment cannot be defended by analogy to cases not involving religion—in which legislatures require employers to compensate employees for lost working time spent in voting and jury service in order to remove "a practical obstacle" to those activities. For promotion of voting and jury service are secular objectives which legislatures are at liberty to foster by any means which satisfy due process. In contrast, because of the Establishment Clause, government cannot affirmatively promote religious observance by even the most "reasonable" means. It is indisputable, we submit, that Government could not constitutionally require employers (or employees) to compensate Sabbatarians for wages lost because of their inability to work on Saturday. Requirement that employers incur expense and hardship, and that employees forfeit their own contract rights and privileges, by substituting for Sabbatarians on Saturday stands on no better ground.

Just as religious observance results in loss of wages for Saturday work, so does it result in disqualification for jobs which require availability for work on Saturday. Like the deprivation of earnings, the job dis-

qualification is voluntary—not imposed by law—and government is neither required nor allowed to compensate religious observers for either consequence at others' expense. Freedom to practice one's religion does not imply, and the Establishment Clause does not allow its extension to, insulation of religious practitioners against hardships and disqualifications which are indigenous to the religious practice itself. Thus, while the Free Exercise Clause guarantees the right of parents to send their children to parochial school, it does not require, and the Establishment Clause does not permit, government to remove the "practical obstacle": payment of both public school taxes and parochial school fees. Similarly, while the Free Exercise Clause guarantees Amish parents against compulsory high school education of their children, it cannot be thought to require, or the Establishment Clause to permit, government to compel employers to hire into jobs requiring a high school education Amish children who have been prevented from acquiring one by religious considerations. So too, while the Free Exercise Clause precludes denial of unemployment compensation to Sabbatarians because of their refusal to work on Saturday, it cannot be thought to require, nor can the Establishment Clause be construed to allow, government to compel employers to hire Sabbatarians into jobs which require employees to work on Saturdays.

The Establishment Clause cannot be evaded by the device of labelling failure to accommodate to religious practice "discrimination." For if job requirements or qualifications are in fact even-handed and relevant to job performance, their incompatibility with religious observance is the product of neutrality, not discrimination, and the accommodation requirement im-

poses discrimination *in favor of* religion in the guise of eliminating discrimination *against* it.

The Religion Clause cases support our position. None holds or implies that any law which compels others to sacrifice rights, interests or money to support or facilitate religious practices can be reconciled with the Establishment Clause.

ARGUMENT

I. TITLE VII NEED NOT AND SHOULD NOT BE CONSTRUED TO REQUIRE SACRIFICE OF SENIORITY AND OTHER EMPLOYEE RIGHTS TO FACILITATE RELIGIOUS OBSERVANCE

A. As Construed by the Court of Appeals, Title VII Would Require Hardison's Fellow Employees To Sacrifice Rights Guaranteed Them by Contract for the Sole Purpose of Facilitating His Observance of His Religious Practice

As we have noted (*supra*, p. 15), the court of appeals, finding that the district court's judgment in favor of the Union and the analysis on which that judgment was based, were "not directly challenged on appeal," (A. 263) declined specifically to review that judgment and affirmed it. We believe, however, and we now demonstrate, that examination of the court of appeals' analysis of TWA's obligations under the statute, on the basis of which the court reversed the district court's judgment for TWA, shows that the court necessarily, albeit implicitly, rejected the district court's analysis and conclusions concerning the Union's obligations as well.

The court concluded, in essence, that the record established the availability of "alternatives" which TWA might have, but did not, offer Hardison. These "alternatives," in the court's view, included permitting Hardison "to work a four-day week [,]" (A. 256)

and filling "Hardison's Sabbath shift from other available personnel [which] could be accomplished by holding a worker over from the last shift, calling a worker in early, or, more logically, assigning a worker from the pool of 200 employees qualified to do the work" (A. 257-258). Both of these "options," the court found, could have been accomplished "[w]ithin the framework of the collective bargaining agreement . . ." (A. 256). The fact is, however, as the record clearly demonstrates, that, with the exception of simply leaving Hardison's job unfilled, none of the "alternatives" proffered by the court of appeals could have been effected without violating or abridging contractual rights of other employees.

1. The first alternative proposed by the court of appeals would, in essence, have required TWA to operate its Saturday shift with either Hardison's slot or some other hourly or supervisory slot on the shift unfilled. The court held that TWA was required by the statute to endure the hardship caused by that short-handed shift, citing only two decisions of the EEOC in support of this proposition.[8] The burden of this

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[8] The cited decisons do not, in fact, support the proposition for which they are cited. Decision No. 70-580, 1973 CCH EEOC Decisions, ¶ 6120 explicitly follows the district court decision in *Dewey* v. *Reynolds Metals Co.*, 300 F. Supp. 709 (E.D. Mich., 1969), which was subsequently reversed. See 429 F.2d 325 (6th Cir., 1970), aff'd by an equally divided Court 402 U.S. 689 (1971). That EEOC decision does not, in any event, assert that an employer may be obliged, in the name of "reasonable accommodation," to operate with an unfilled job slot. The decision in No. 70-110, 1973 CCH EEOC Decisions ¶ 6062, found unlawful an employer rule which required, as a condition of working at overtime rates on Sunday, that an employee also work on Saturday, where employees were permitted to work on Saturday and skip Sunday without penalty. This decision thus requires only that Saturday worshippers be treated the same as Sunday worshippers.

option would, of course, fall entirely on the employer since, by definition, it would not require any other employee to work out-of-shift or out of schedule. It is, as we understand it, TWA's position that Title VII was not intended, and ought not be construed, to impose such a burden under the circumstances of this case, and we assume TWA will make that demonstration in its brief.

2. All of the other "options" which the court of appeals found available to TWA would, in fact, have implicated collectively-bargained rights and interests of Hardison's fellow employees. Thus "holding a worker over from the last shift [or] calling a worker in early" (A. 257-258) both would require scheduling, and paying for, overtime work at overtime rates.

Article VIII(a) of the applicable collective bargaining agreement requires payment at the rate of time and one-half the regular hourly rate "for all work performed in excess of eight (8) hours in any one day, [and] for all work performed either in advance of or after regularly scheduled hours . . ." (A. 216). As we understand it, TWA will argue that this additional cost of overtime pay is, *per se*, "undue hardship."

However, Article VIII(g) provides that "[e]xcept in an emergency, an employee will not be required to work overtime against his wishes" (A. 216). Inasmuch as a repeated, predictable absence from work of an employee regularly scheduled to work was not considered to be an "emergency" within the meaning of Article VIII (A. 128, 134-135), no unwilling employee could have been called in early or held over after his shift without violating his contractual right to refuse overtime work.

3. The court next identified the "more logical [ ]" alternative of "assigning a worker [to fill in for Hardison] from the pool of 200 employees qualified to do the work" (A. 258). This statement, and the court's assumption that this alternative was available "within the framework of the collective bargaining agreement" (A. 256), demonstrate a rather fundamental misunderstanding of the facts shown in the record.

The record basis for the court's assertion that there were 200 people available who could perform Hardison's work is the following exchange between the trial judge and Mr. Everett Kussmann (A. 133-134):

> The Court: Well, apart from the question of seniority, perhaps counsel wants to get—at least I would like to get to it—how many other people in the employ of TWA could perform his assigned duties.
>
> The Witness: Well, with limited instruction, any stores personnel we've got.
>
> The Court: I understand, but I am talking about assuming, if one can assume in this day, the [250] absence of any seniority at all, to perform the function, how many bodies would be available to perform this work.
>
> The Witness: In the grouping and not on the specific date?
>
> The Court: Yes, in the whole group.
>
> The Witness: Better than 200.
>
> The Court: 200 available other people that could perform this job, any one of whom without detriment to the company could trade his Saturday without hampering the operation of the company, this is assuming no restrictions on seniority, is that a fair statement?
>
> The Witness: That is a fair statement.

Quite contrary to the court's assertion, however, the colloquy makes perfectly clear that Kussmann's estimate assumed the hypothetical situation in which TWA was contractually free to move individual employees to different jobs, different shifts, and different schedules. The district judge obviously so understood it, and also understood that, in fact, TWA did not have that right.

In fact, of course, Hardison was the only man on his Saturday shift, out of a scheduled Progress Stores work force of 38 to 40 people (A. 133) assigned to his job. Thus, to cover that job from the 200 "available" people, TWA would have had to change another person's schedule, necessarily scheduling for Saturday work a person who otherwise would have had Saturday off. And since shift assignments and selection of days off were, under the contract, governed by seniority (A. 214), such rescheduling would have required violation of some employee's contractual rights. It was, indeed, precisely this realization which rendered Kussmann's March 6, 1969 attempt to solve Hardison's problem unproductive, as Hardison himself recognized at the time (A. 70-71, 83-84). It is therefore, in our view, beyond dispute that none of the options which the court of appeals found available to TWA "within the framework of the collective bargaining agreement" were, in fact, available, since all of them would have involved adjustments of schedules which had been assigned by seniority.

4. Finally, the thrust of the court's analysis is made absolutely clear by its treatment of a "third alternative" (A. 259). Here, fully recognizing that neither TWA nor the Union had any objection to Hardison's changing shifts or days off so long as the

change could be accomplished consistently with the collective bargaining agreement, the court suggests that more would be required of the Union. "It would seem that a collective bargaining agreement, the seniority provisions of which preclude *any* reasonable accommodation for religious observances by employees, is prima facie evidence of union and employer culpability under the Act" (A. 260). The court thus explicitly, albeit in *dictum,* lays down the rule which is implicit in its earlier treatment of TWA's "alternatives": Title VII, says the court, compels the sacrifice of non-Sabbatarian employees' lawfully-acquired, honestly-held, highly-valued, collectively-bargained rights, where that sacrifice is required to enable their Sabbatarian colleagues to practice their religion. This interpretation, in the Union's view, finds no plausible support in either the legislative history or the judicial development of Title VII; it should therefore be rejected.

B. Title VII Does Not Require Sacrifice of Seniority and Other Employee Rights To Facilitate Religious Observance

1. As just shown, the question in this case is whether prohibition against discrimination on the basis of religion in Title VII requires that in order to allow an employee to avoid the adverse impact of a neutral employment rule on his practice of his religion, the rights which other employees have earned under a neutral seniority system must—or even may—be destroyed. We submit that this question must be answered in the negative, on both statutory and constitutional grounds. The Court of Appeals' affirmative answer is not supported by the language or the legislative history of Title VII either as it was enacted originally in 1964 or under the 1972 Amendments

which the Court of Appeals read back into the 1964 Act.

Moreover, for Congress to mandate a preference for one employee over others on the basis of the former's religious beliefs and practices would raise a substantial—and we submit insuperable—constitutional objection under the Establishment Clause of the First Amendment. Accordingly, there "comes into play [the canon of construction] that when a statute is ambiguous, 'construction should go in the direction of constitutional policy.' *United States* v. *Johnson,* 323 U.S. 273, 276 (1944)." *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 134 (1974). Thus, since "our 'task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations" (*id.,* quoting *CSC* v. *Letter Carriers,* 413 U.S. 548, 571, (1973)), the court of appeals' interpretation of Title VII should be rejected.

2. If a company requires the services of employees on Saturday, some of its employees will *have* to work that day. If that assignment is considered undesirable, the employer, or if the employees are represented by a union, the collective agreement, will have to state the method for determining who shall be required to fill that undesired assignment. In essence, the court of appeals held that Title VII of the Civil Rights Act of 1964, as amended, mandates assignment rules which require employees who are not Sabbatarians, against their will to perform all Saturday work and exempt all Sabbatarians from any such work. On this premise, rules which provide all employees an equal opportunity to avoid Saturday work—such as the seniority rule here—are labelled prohibited discrimination against

Sabbatarians. This paradoxical conception of Title VII discrimination is contrary to the basic purpose of that Act.

Section 703 of the Act, the provision that declares the statute's norms, prohibits *both* visiting adverse consequences on individuals "because of such individual's race, color, religion, sex or national origin" (§ 703(a) and (c)), *and* granting benefits to any individual "because of such individual's race, color, religion, sex or national origin" (§ 703(j)). The point of intersection of these two prohibitions is that "[d]iscriminatory preference for *any* group, minority or majority, is precisely and only what Congress has proscribed." *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 431 (emphasis added). We can see no escape from the logic of the proposition that requiring individuals who do not espouse any religion, or a religion that does not regard Saturday as the Sabbath, to do undesired Saturday work, and excepting individuals who do espouse a Sabbatarian religion from that undesired work, is the very "discriminatory preference for * * * [a] minority * * * group" which § 703 in terms prohibits. And, so far as we are aware from our research, there is nothing in the 1964 legislative history to indicate that Congress specifically intended to require non-Sabbatarians to do undesired Saturday work which, under a religiously neutral rule, would otherwise be required of a Sabbatarian.

3. *Griggs* is the only Title VII decision in this Court cited by the court below. But, the reasoning and result in *Griggs* supports our view.

This Court there noted that "Congress directed the thrust of the Act to the *consequences* of employment

practices, not simply the motivation," and held that Title VII therefore prohibits non-job-related ability tests that are the product of "good intent, * * * that are [also] fair in form, but [are] discriminatory in operation." 401 U.S. at 431-432 (emphasis in original). Whatever the limits of *Griggs'* so-called "effects" test may eventually prove to be (see *General Electric Co.* v. *Gilbert*, — U.S. —, 45 L.W. 4031, 4034), the first limiting principle on the doctrine there announced is apparent from the decision itself. Consistent with Title VII's prohibition of both discrimination against and preferences for any group, *Griggs'* holding does not sanction an advantage for minorities because of their status as such, nor does it impose a detriment on the majority *qua* majority. The very point of *Griggs* is that all job seekers are to be provided what is *in fact* an *equal* opportunity in job competition and not an opportunity skewed in favor of the majority where that "consequence would appear to be directly traceable to race" (*id.*, at 430). To underline this limitation, the Court emphasized that "the Act does not command that any person be hired simply because * * * he is a member of a minority group." *Id.*, at 430-431.

Thus, *Griggs* recognizes that job allocation rules that do, in fact, provide majorities and minorities the *same* chance to secure the benefit both seek is what the Act requires, whereas rules that provide majorities or minorities, because of their status as such, a *superior* chance to prevail in the competition, is what the Act *prohibits*. Here, of course, the Court of Appeals did not conclude that Sabbatarians were denied an equal opportunity to avoid Saturday work; rather, it read Title VII to mandate rules that exempt Sabbatarians

from all Saturday work and require only non-Sabbatarians to work on Saturday. It thereby deprived senior non-Sabbatarians of the right they earned by their past labor to choose whether or not they wish to work on Saturday.

Nothing in *Griggs* suggested or implied that minorities should be exempted from legitimate job requirements or qualifications that the employer even-handedly exacts of all employees regardless of their race, color, sex, religion, or national origin. Nor does anything in *Griggs* require that white applicants for employment be subjected to a more stringent test for determining their qualifications than black applicants, or suggest that a test culturally biased against whites or in favor of blacks be given. *Griggs'* holding that the *effect* of facially neutral employment tests may prove them discriminatory does not look to the contrary, for "discrimination" is defined as composed of two elements: (1) "artificial, arbitrary and unnecessary barriers to employment"; (2) which "operate invidiously to discriminate on the basis of racial or other impermissible classification" (*id* at 431). The Court in *Griggs* said "Congress did not intend by Title VII * * * to guarantee a job to every person regardless of qualifications." 401 U.S. at 430. It quoted proponents of Title VII as follows, *id.* at 434:

> "the proposed Title VII 'expressly protects the employer's right to insist that any prospective applicant, Negro or white, *must meet the applicable job qualifications*. Indeed, the very purpose of title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.' 110 Cong. Rec. 7247." (Emphasis in original.)

And the Court concluded, *id.*, at 436:

> "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant."

Neutral tests,[9] which "measure the person for the job" (*id.* at 436), in terms relevant to legitimate job requirements and qualifications are not discriminatory under

[9] While we do not understand the respondent to controvert the religious neutrality of the seniority system, out of an abundance of caution we pause to demonstrate the accuracy of our characterization. The essence of the "seniority principles * * * increasingly used to allocate entitlements to scarce benefits among competing employees ('competitive status' seniority) and to compute noncompetitive benefits earned under the contract of employment ('benefit' seniority)" is that time in service with the employer computed from the "company date of hire", or the "departmental date of hire" or an alternate beginning point, is the determinant of, or a factor in, allocation decisions and benefit computations. (*Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 766-767.) If, as in *Franks*, departmental seniority is used, so long as the seniority rules are themselves neutral and are applied according to their terms, every employee, without regard to race, color, religion, sex or national origin, receives full and equal credit for every day worked in that department. And, the system provides that allocation decisions are made in favor of the individual with the most credits, and that benefit decisions are also directly related to the credits accumulated. Company seniority systems follow the same pattern, except that a different "hiring" date is utilized in making the computations. Thus, so far as we are able to understand, it is impossible to conceive of such a seniority system that produces results that are congruent with any variable other than the neutral factor of time worked in the particular department, company, *etc.*

To be sure, as this Court recognized in ***Franks,*** where a seniority system applies, if the employer discriminates in ***hire*** (or

that standard regardless how adversely they impact on minorities versus majorities.

It is, we submit, indisputable, that for jobs which require Saturday work of employees, availability for Saturday work is a legitimate job qualification, and that there must be a system which allocates Saturday off. It is equally plain that the seniority system here provides a neutral means of deciding who shall work Saturday and who shall not that comports with Title VII, even though Sabbatarians are disadvantaged because of their self-imposed inability to work on Saturday. Indeed, to exempt Sabbatarians from that work requirement is to ignore the lesson of *Griggs* that the statutory prohibition against discrimination forbids giving any advantage to any individual "because of

assignment or discharge), a potential consequence is that the victims of that discrimination will be adversely affected in that they "will perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to [the] benefits [allocated according to seniority] his inferiors." (*Id.* at 768.) But, since this adverse effect is the direct product of the hiring system and is therefore confined to the individuals that the particular employer has actually discriminated against in hire, as opposed to minority persons and women generally whom that employer has not discriminated against and who are therefore in their "rightful place in the hierarchy of seniority" (*id.*), the Court also recognized that the "underlying legal wrong affecting them is *not* the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system." (*Id.* at 758; emphasis added.) And the ultimate point of *Franks* is that individuals who are the victims of a "racially discriminatory hiring system" (or a racially discriminatory discharge system) who in a timely fashion directly challenge that legal wrong are also assured their "rightful" place in the seniority system. *Id.* at 762-770.

Here, of course, there is no allegation that TWA discriminated against Hardison, in hire or assignment, and, indeed, no claim at all that he was not in his rightful place in the seniority system.

such individual's race, color, religion, sex or national origin."

4. The court of appeals interpreted § 703 of the 1964 Act as requiring TWA to give preference to Hardison's desire not to work on Saturday over the desire of senior employees whose motivation was not religious on the basis of 1967 EEOC Guidelines interpreting the 1964 Act which the court deemed to have been approved by the 1972 Congress in adding § 701(j) to the Act. The court of appeals misunderstood both the Guidelines and what Congress did in 1972.

We submit that the court erred, *first,* because the Guidelines themselves do not in terms justify the result it reached, and *second,* because there is in any event no indication that in enacting § 701(j) the 1972 Congress understood the Guidelines to require a preference among employees for those motivated by religious considerations, or intended so sharply to depart from the basic anti-discrimination philosophy of Title VII and from Congress' own historic neutrality with respect to religion. On the contrary, the 1972 legislative history confirms what appears from the language of § 701(j) and the Guidelines, namely, that Congress intended a far narrower, and constitutionally more defensible, result: to declare a rule of decision for cases such as *Dewey* v. *Reynolds Metals Co.,* 402 U.S. 689 (1971), where an equally divided Court had affirmed a court of appeals decision holding that the Act did not require an employer to *attempt* to find a willing replacement for an employee who objected, for religious reasons, to work on a particular day.

(a) The Equal Employment Opportunity Commission first issued Religious Discrimination Guidelines

on June 15, 1966.[10] The Commission there expressed the view that "the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate the reasonable religious needs of employees . . . ." The Commission did not then believe, however, that that duty would prevent an employer from establishing "a normal work week . . . generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees . . . ."[11] By way of illustrating what it conceived to be the impact of these Guidelines on specific situations, the Commission, in paragraph (b), offered the following examples, among others: "(1) An employer *may permit* absences from work on religious holidays . . . but must treat all religions with substantial uniformity in this respect. . . . (4) where an employee has previously been employed on a schedule which does not conflict with his religious obligations, and it becomes necessary to alter his work schedule, the employer *should attempt to achieve an accommodation* so as to avoid a conflict. However, an employer is not compelled to make such an accommodation at the expense of *serious inconvenience* to the conduct of his business or *disproportionate allocation of unfavorable work assignments to other employees* (emphasis added)."[12]

It thus seems clear that, in 1966, the Commission did not believe that Congress had intended to require ex-

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[10] 31 F.R. 8370. *See* CCH Employment Practices Guide ¶ 3970, n. 1.

[11] CCH Employment Practices Guide § 3970, n. 1.

[12] *Id.*

tension of unequal, preferential, treatment to religious practitioners. Employers, to be sure, were obliged to be particularly sensitive to the religious needs of their employees; they were not, however, required to create special schedules, let alone burden their other employees, in order to "accommodate" religious practices.

The 1966 Guidelines were replaced on July 10, 1967.[13] It will be well to have before us their operative text in full:

> "(b) The Commission believes that the duty not to discriminate on religious grounds required by Section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation *on the part of the employer to make reasonable accommodations* to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.
>
> "(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.
>
> "(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people." 29 C.F.R. § 1605.1 (1975).[14] (Emphasis added.)

[13] 32 F.R. 10298; 29 C.F.R. § 1605.1.

[14] Subparagraph (a) states the issue involved in the Guidelines, namely, the refusal to work for religious reasons.

It will at once be seen that there is nothing in the terms of the Guidelines which requires that a preference be given to any employee over any other employee. Nor do the Guidelines assert that any *employee* must accommodate himself to the religious needs of other employees. Only "the employer" is obligated to make reasonable accommodations. The Guidelines do not suggest that the draftsmen foresaw or confronted the problem of compulsory accommodation *by employees,* independently, or as a consequence of compulsory accommodation by the employer.

Nor is the court of appeals' construction of the 1967 Guidelines supported by comparison with the predecessor, from which the 1967 version differs in three noteworthy respects: *first,* the 1966 version required the employer to accommodate if that could be done "without serious inconvenience to the conduct of the business[,]" [15] while the current version requires accommodation where it can be made "without undue hardship." [16] *Second,* the current Guidelines place upon the employer the burden of proving that "undue hardship" would result from any proposed accommodation.[17] *Third,* all the illustrative examples contained in paragraph (b) of the 1966 Guidelines were deleted.

These changes cannot be understood, singly or in combination, as converting the 1966 instruction that a "disproportionate allocation of unfavorable work assignments to other employees" is not required into a demand for disproportionate allocation wherever necessary to accommodate an employee's religious obliga-

[15] CCH Employment Practices Guide ¶ 3970, n. 1.

[16] 29 C.F.R. § 1605.1.

[17] *Id.*

tions. At most, the revised Guidelines withdrew the prior resolution of the problem, leaving it to future disposition on a case-by-case basis, ¶ (d).[18] The difference between "serious inconvenience" and "undue hardship" may, and doubtless was intended to, connote a difference in degree, whereby the obligation to accommodate would be imposed on employers in a larger number of cases. However, the change in standard does not even suggest that a preference *among employees* was contemplated.

Further, while shifting the burden of proof to the employer doubtless would also change the outcome in some cases (cf. *Armstrong* v. *Manzo,* 380 U.S. 545, 551 (1965)), the Guidelines say nothing about what kinds or classes of conduct are lawful and unlawful; specifically, whether preference of some employees over others is required. Finally, elimination of the illustrative example respecting the impact on other employees cannot lead to any inference, because the 1967 Guidelines eliminated *all* the illustrative examples in the 1966 Guidelines. To reason that dropping an illustration equals adopting the opposite rule would make no sense at all, because that would mean that under the 1967 Guidelines "[a]n employer may [not] permit absences from work on religious holidays * * *". Compare 1966 Guidelines b(1), quoted above.

For the foregoing reasons, the court of appeals was in error in believing that the 1967 Guidelines give guidance as to how this case is to be decided.

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[18] Of course, since the 1964 Act deliberately left enforcement to the courts, this promise to "review each case on an individual basis" meant only that the Commission would determine in "each case" whether to issue a right-to-sue letter or what informal, non-binding, advice it would give to those who solicited it.

(b) But even if the court of appeals' construction of the 1967 Guidelines is accepted, that would not lead to a decision in plaintiff's favor on the issue of construction of the 1964 Act. As to that, the question would remain as to what effect should be given the 1967 Guidelines in construing the 1964 Act. It is plain enough that, but for succeeding events, these Guidelines would be entitled to little if any weight. The analysis would be identical to that in part III of the recent opinion in *General Electric* v. *Gilbert,* — U.S. —, 45 L.W., 4031, 4035-4037 (Dec. 7, 1976). For, if they mean what the court of appeals held that they mean, the 1967 Guidelines "conflicted with earlier pronouncements of the Agency" (*id.* at 4036), namely the 1966 Guidelines, and therefore do "not receive high marks when judged by the standards enunciated in *Skidmore* [v. *Swift & Co.,* 323 U.S. 134, 140 (1944)]" (*id.*). And, on the same assumption, the 1967 Guidelines are, as in *Gilbert,* at sharp variance with the basic anti-discrimination philosophy of the Act. Standing alone, therefore, the 1967 Guidelines, however construed, cannot support the decision below.

(c) But, of course, the 1967 Guidelines do not stand alone, since Congress, in 1972, added to the Civil Rights Act § 701(j), which incorporates a substantial part of the language of the 1967 Guideline. Implicit in the court of appeals' reliance on § 701(j) is the proposition that Congress thereby ratified the 1967 Guidelines "with positive legislation", cf. *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 381-382 (1969). On that premise, the question presented is whether the 1972 Congress intended to prefer religious believers to other employees when their interests conflict, as when *someone* must unwillingly work on Saturday.

The question, admittedly, is a closer one than that under the 1964 Act alone, but once again the sounder conclusion by far is that Congress did not intend so radical a departure from the original "discrimination" concept.

What has already been said of the 1967 Guidelines suffices to show that the similar language of § 701(j) does not declare that in choosing who among his employees will be required involuntarily to perform necessary work on Saturday an employer must exclude Sabbatarians and impose that burden only on others. Yet, the requirement of such a preference would have to appear unambiguously if the court of appeals' interpretation were to be adopted, given the substantial constitutional issues raised by that construction, see p. 30 *supra*. As Mr. Chief Justice Hughes wrote, "if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson,* 285 U.S. 22, 62 (1932), quoted in *e.g., United States* v. *Rumely,* 345 U.S. 41, 45 (1953), and *Machinists* v. *Street,* 367 U.S. 740, 749 (1961), where First Amendment issues were avoided.

The absence of any—much less a clear—indication that a preference to one group of employees over another was intended is highly significant also because in its absence the inference is compelling that Congress did not intend to abandon the equal treatment concept of discrimination in Title VII, see pp. 31-35, *supra.*

Moreover, the court of appeals' construction of Section 701(j) necessitates reading into Section 701(j) a

partial repeal of the Section 703(h) preservation of *bona fide* seniority systems and of the Section 703(j) prohibition against preferential treatment. Yet there is not the slightest hint anywhere in the history of Section 701(j) that Congress even thought about, much less purposefully intended, to dilute in any way the protections contained in those two sections. The important role those two sections play in the overall scheme of Title VII, and the complete absence of any evidence suggesting an intent to repeal them, make this "a prototypical case where an adjudication of repeal by implication is not appropriate." *Morton* v. *Mancari,* 417 U.S. 535, 550 (1974).

Nothing in the sparse legislative history of § 701(j) would have caused the members of the 1972 Congress to believe that they were enacting a preference for one group of employees over another. Senator Randolph, the sponsor of § 701(j), in presenting the Amendment to his colleagues, described it as follows:[19]

> Mr. Randolph: . . . [I]n presenting this proposal . . . it is my desire . . . to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law . . .
>
> I say to the distinguished chairman of the Labor and Public Welfare Committee, who manages this bill, that there has been a partial refusal at times on the part of employers to hire or continue in employment employees whose religious practices

[19] The Amendment which became Section 701(j) was not in the bills reported out from Committee in either house. It was added to the Senate bill (S. 2515) on the floor and accepted by the House as part of the final Conference Committee report. The history thus consists almost entirely of the brief debate in the Senate preceding adoption of the Amendment by that body.

rigidly require them to abstain from work in the nature of hire on particular days. So there has been, because of understandable pressures, such as commitments of a family nature and otherwise, a dwindling of the membership of some of the religious organizations because of the situation to which I have just directed attention. . . .

I invite the attention of my able colleague to the fact that in the State of New Jersey there are many, many Seventh Day Baptist churches. In places like Shiloh, Marlboro, and Plainfield—actually being the headquarters of the denomination to which I belong, located close to New York City, but actually located in the State of New Jersey.

My own pastor in this area, Rev. Delmer Van Horne, has expressed his concern and distress that there are certain faiths that are having a very difficult time, especially with the younger people, and understandably so, with reference to a possible inability of employers on some occasions to adjust work schedules to fit the requirements of the faith of some of their workers.

The term "religion" as used in the Civil Rights Act of 1964 encompasses, as I understand it, the same concepts as are included in the first amendment—not merely belief, but also conduct; the freedom to believe and also the freedom to act.

I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State, or local governments . . . .

The amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved . . . .

After only brief debate the amendment was unanimously adopted by the Senate, and thereafter accepted

by the Conference Committee and the House. The section-by-section analysis of the Conference Report states, regarding Section 701(j), that "[t]he purpose of this subsection is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in *Dewey* v. *Reynolds Metals Company,* 429 F.2d 325 (6th Cir. 1970), affirmed by an equally divided court, 402 U.S. 689 (1971)."[20] *Dewey* was the decision to which Senator Randolph alluded when he spoke of "resolv[ing] by legislation . . . that which the courts apparently have not resolved."

But there is no reason to assume that he intended § 701(j) to protect "freedom to act" at the expense of competing rights and interests of others. The Senator's reference to the obligations of the Federal Government as an employer strengthens the inference that he was embracing First Amendment law rather than giving conduct greater protection than it would have against Government under the Constitution.[21] There is no indication that Senator Randolph or his colleagues believed that Freedom of Religion embraces a right to preferential treatment for religious practitioners, or that the Establishment Clause permits Congress to enact such a preference. Thus, § 701(j) is properly read as giving *some* protection to employees acting on their religious beliefs, but not as specifying the circumstances under which the right to act must yield. With respect to that issue, the only guidance § 701(j) pro-

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[20] 118 Cong. Rec. 7167 (March 3, 1972).

[21] To the same effect are Senator Randolph's statements that it was his desire to "assure . . . freedom from religious discrimination" and "to resolve [the problem of religious discrimination] in a way I think was originally intended by the Civil Rights Act".

vides is that "unreasonable" accommodation is not required.

The description of § 701(j) in the Conference Report confirms our understanding of its limited reach. It will not be gainsaid that the Report approved the 1967 Guidelines, but it gives no indication as to what Congress thought that those Guidelines meant, let alone that they meant what the court of appeals in this case said they mean. Nor does the citation of the *Dewey* case support the court of appeals' construction. To begin with, it is by no means clear that the Report intended to reverse the result reached by the court of appeals in *Dewey*. For, while the 1967 Guidelines were "challenged" in that case the court of appeals assumed their validity and nonetheless decided the case in favor of the defendant company. Thus, the authorization to the EEOC to establish Guidelines such as those challenged in *Dewey* does not even dictate what result would follow under those Guidelines if another case identical to *Dewey* were to arise.

Moreover, even if the Conference Report could be read as disapproving the result in *Dewey*, that would not require judgment in favor of Hardison. For in *Dewey* the plaintiff had available, and had repeatedly used, a contractual right to arrange his own voluntary replacements for his Sabbath shifts. It was only when he refused any longer to arrange for his own replacements that he was terminated, an action which the court of appeals held his employer had a right to take. *Dewey*, 429 F.2d at 329. Thus, in the context of *Dewey*, the intended purpose of the Amendment becomes clear. For there the employer could have assumed the presumably *de minimis* burden of finding and scheduling Mr. Dewey's Sabbath replacement.

In that case, no rights of other employees would have been implicated by a substitution, for the collective bargaining agreement in that case, as construed, permitted it. *Id.* Yet, a majority of the court of appeals in *Dewey* effectively held that the employer did not have *that* obligation.

The Randolph Amendment, then, would serve a significant purpose if construed to impose on Reynolds Metal and other employers similarly situated a legal obligation to seek a voluntary substitute for Sabbatarians such as Dewey. That would have the effect, where accommodation would not violate any rights of others, of placing the "burden * * * on the employer and not the employee asking for an accommodation to seek out the cooperation of other employees * * *. *Claybaugh* v. *Pacific Northwest Bell Telephone Co.*, 355 F. Supp. 1, 5 (D. Ore. 1973). It would require an attempt to arrange voluntary transfers of days, shifts or jobs, where such transfers would solve the religious practitioner's problem, provided that such transfers would not conflict with rights or obligations imposed under non-discriminatory collective bargaining agreements or seniority policies. *See* A. 208-209.

In general, § 701(j) can thus be construed to require *some* attempt to facilitate a religious practitioner's efforts to avoid conflicts between his work and his religion, provided it does not require preferential, discriminatory, treatment of such employees at their colleagues' and employers' expense. For, in addition to being irreconcilably at war with the balance of Title VII and devoid of convincing legislative historic support, the latter construction would, as we now demonstrate, violate the Establishment Clause of the First Amendment.

II. CONSTRUING THE ACCOMMODATION REQUIREMENT AS OVERRIDING NEUTRAL SENIORITY RIGHTS AND LEGITIMATE WORK AND JOB INTERESTS WOULD CREATE CONFLICT WITH THE ESTABLISHMENT CLAUSE

A. Broadly Construed, the Accommodation Requirement Is in Inescapable Conflict with Rights and Interests of Others.

Decisions of this Court make it clear, and it appears to be common ground,[22] that to survive Establishment Clause challenge, the "accommodation" requirement, as construed below, at the least must have a secular purpose. *Meek* v. *Pittenger,* 421 U.S. 349, 358 (1975). The only such purpose which has been suggested is promotion of "free exercise values." But the premise necessarily implicit in that suggestion is that "free exercise values" include an obligation on the part of others to assume burdens and expense, and to sacrifice their own contract rights and liberties, to facilitate their fellows' religious exercises. Because that premise is patently false, and for other reasons elaborated hereafter, the requirement as construed below cannot be reconciled with the Establishment Clause.

The court below construed § 701(j) to mean that if seniority rights and other valid provisions of a collective bargaining agreement prevent "accommodation" of religious practices the agreement must give way (A. 256-260). We have shown, pp. 25-28, *supra,* that Hardison's demand for Saturdays off could not have been accommodated without trenching upon rights guaranteed all bargaining unit employees by the collective agreement (1) to bid for shift assignments and days off on the basis of seniority (A. 214), (2) to refuse overtime work unless required by an "emergency" (A. 216).

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[22] But see p. 78, n. 47, *infra.*

"Accommodation" is similarly prevented in many (but see pp. 46-47, *supra*), establishments where the "competitive status seniority" provisions of a collective bargaining agreement govern, *inter alia,* "rest days [and] shift assignments" (*Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 766 (1976)); (A. 225); *Johnson* v. *U.S. Postal Service,* 497 F.2d 128, 129 (5 Cir., 1974) ("Accommodation" required "forcing men senior to [plaintiff] to work on Saturday"); *Dawson* v. *Mizell,* 325 F. Supp. 511, 512, 514 (E.D. Va. 1971) ("assignment * * * of the plaintiff to a position resulting in his having Saturdays off would be violative of the spirit as well as the substance of the agreement under which Post Office employees work. * * * [T]he seniority rights contained in the agreement are of the utmost importance to the employees.").

This Court said in *Franks, supra,* at 766: "Seniority principles are increasingly used to allocate entitlements to scarce benefits among competing employees ('competitive status' seniority) * * *." As Mr. Justice Powell put it, "*competitive* type seniority * * * determines an employee's preferential rights to various economic advantages at the expense of other employees" (*id.,* at 787, concurring in part and dissenting in part; emphasis in original). Thus, if the Randolph Amendment is construed to require contracting employers and unions to force seniors to work on Saturday or Sunday to "accommodate" religious practices of juniors, the Court is confronted with a "collision" between the "freedom asserted by [Hardison and other religionists and] rights asserted by . . . other[s] * * *." *Braunfeld* v. *Brown,* 366 U.S. 599, 604 (1961), quoting *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 630 (1943). In that collision, the demand to "accommodate" can hardly survive.

B. Facilitation of Religious Practice at the Expense of Others Produces Evils Against Which the Establishment Clause Is Aimed.

In *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 772 (1973), this Court said:

> "What our cases require is careful examination of any law challenged on establishment grounds with a view to ascertaining whether it furthers *any of the evils against which that Clause protects.*" (Emphasis added.) [23]

Five of those evils are furthered by the challenged construction. As detailed below, these are: (1) discriminatory preference of religious over secular reasons for absence from work; (2) facilitation of religious activity for its own sake, by removal of non-discriminatory work-barriers; (3) taxation to support religious activity by imposing forfeiture of rights, expense and hardship upon others; (4) entanglement of employers, unions, a government agency and the courts in determination of religious questions; and (5) division of the work force politically along religious lines.

(1) Breach of Neutrality by Discriminatory Preference of Religious Causes.

The Establishment Clause prohibits government preference of religious over secular causes. "The Court has enforced a scrupulous neutrality by the

[23] As the italicized phrase indicates, the Court has recognized that "the now well-defined three part test" (*id.*) first enunciated in *Lemon* v. *Kurtzman,* 403 U.S. 602, 612-613 (1971), is not entirely comprehensive but is particularly applicable in evaluating "the constitutionality of statutes affording state aid to church-related schools." *Roemer* v. *Board of Public Works of Maryland,* 44 L.W. 4939, 4943 (1976).

[government] * * * as between religious and other activities * * *." *Roemer, supra,* 44 L.W. at 4942. Government cannot "constitutionally pass laws or impose requirements which aid all religions [or religious practices] as against non-believers." *Torcaso* v. *Watkins,* 367 U.S. 488, 495 (1961). By singling out religious practices for compulsory accommodation, leaving all secular reasons for absence, no matter how worthy, unprotected, Section 701(j) "imposes a priority of the religious over the secular" (p. 12, *supra*); it "mandates discrimination in favor of religion against non-religion." [24] As Judge Celebrezze put it in *Cummins* v. *Parker Seal Co.,* 516 F.2d 533, 558 (6 Cir., 1975), aff'd by an equally divided Court, 45 L.W. 4009 (Nov. 2, 1976):

> "Only those with 'religious practices' may benefit from the rule. Others are forced to submit to uniform work rules and to bear the burdens imposed by their employers' accommodation to religious practitioners. Thus, the rule discriminates against those with no religion, although the freedom not to believe is within the First Amendment's protection."

Discrimination in favor of religious and against non-religious interests and activities is the antithesis of neutrality.

(2) Promotion of Religious Activity for Its Own Sake

Imposition of the "accommodation" requirement violates government's obligation to "confine itself to

[24] *Can the Government Require Accommodation of Religion at the Private Job Site?,* 62 Va. L. Rev. 237, 253, 257 (1976).

secular objectives, and neither advance nor impede religious activity" (*Roemer, supra,* at 4943). Both elements are violated. In the first place, there is no secular objective. The only such objective claimed by its supporters[25] is implementation of the elimination of discrimination on one of the grounds Congress declared "irrelevant" to "job qualifications". *Griggs,* 401 U.S. at 436. But, as demonstrated herein, inasmuch as religious *practice* (as distinguished from religious *belief*) *is* relevant to non-discriminatory job qualifications, *i.e.,* availability for work when needed, the "accommodation" requirement does not merely implement the protection of religion against discrimination; instead, it elevates religious practice to a preferred position. Indeed, it subordinates job requirements to conflicting religious requirements. As Judge Celebrezze said in *Cummins,* 516 F.2d at 556:

> "Section 2000e(j) defines religion so as to require that persons receive preferential treatment because of their religion. This contradicts the secular purpose behind the original Title VII. Rather than 'putting teeth' into the Act, it mandates religious discrimination, thus departing from the Act's basic purpose."

Discriminatory facilitation of religious observance at the expense of non-discriminatory job requirements cannot be said to have a secular objective.

Furthermore, facilitation by removal of relevant non-discriminatory barriers is a "direct and substantial advancement of religion". *Nyquist, supra,* 413 U.S. n. 39, at 785; *Meek, supra,* 421 U.S. at 366. Facilitation being the patent and avowed object,[26] that is inevitably its "primary effect" (*Roemer, supra,* at 4944). With all deference to the courts below, it cannot reasonably be argued that the "primary effect is to guarantee job security" (A. 202, 264-265); that guarantee is not an "effect" but the *method* of facilitating religious observance. Like a tax credit to parents who perform a religious duty by sending their children to a parochial school, the accommodation requirement is but the means to an end—facilitation of religious practice. Since promotion of religious observance *is the end,* its forseeable attainment cannot be dismissed as an "indirect," "remote" or "incidental" effect. *Nyquist, supra,* 413 U.S. at 771; *Roemer, supra,* 44 L.W. at 4942.

[25] (A. 264-265); *Cummins,* 516 F.2d at 552.

(3) Taxation of Others To Support Religious Practices.

Although not a tax in form, the accommodation requirement is a tax in effect and consequently violates the prohibition against taxation to support religious observance. Thus, insofar as accommodation is held to require defeasance of seniority or other valuable contract rights, or conscription of, or payment of overtime to, substitutes for religious practitioners, property rights and even liberty are taken by force of law to benefit religious observance. That is the most egregious of establishment evils; one against which the Clause was initially directed. The preamble to Thomas Jefferson's Bill for Establishing Religious Freedom

[26] Senator Randolph explicitly stated that the object was to facilitate Sabbatarian religious practice and observance, 118 Cong. Rec. 705-706 (1972), pp. 43-44 *supra,* and the EEOC Guidelines, 29 C.F.R. § 1605.1, state no other object.

declared "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Everson* v. *Board of Education,* 330 U.S. 1, 13 (1947). That principle obviously applies as well to involuntary contributions of property or services as to "money" and as much to observance of religious practices as to the propagation of religious "opinions". Indeed, the enactment predicated upon the preamble declaration broadly guarantees that "no man shall be compelled to * * * support any religious worship * * * ."[27] *Id., Nyquist, supra,* 413 U.S., n. 28, at 771. The prohibition is absolute: "[n]o tax in any amount, large or small, can be levied to support any religious activities * * * " (*Meek, supra,* 421 U.S. at 359; *Nyquist, supra,* 413 U.S. at 780); government "was stripped of all power to tax, to support, or otherwise to assist any or all religions * * * ." *Everson, supra,* 330 U.S. at 11.[28]

(4) INVOLVEMENT IN RELIGIOUS JUDGMENTS.

The accommodation requirement violates the prohibition against "entanglement" in the classic sense. It is true that under § 701(j) government does not itself distinguish, in the first instance, between what is a religious practice which must be accommodated and

[27] The preamble condemns not only requiring a man to support religious practices of others of which he disapproves, but requiring him to support his own religion or religious practices which he approves. Such compulsion "is depriving him of the comfortable liberty of" making voluntarily such contributions as he chooses to make. *Id.;* see also Mr. Justice Rutledge's dissenting opinion in *Everson,* 330 U.S. at 36-41, 44, n. 38, 45-46.

[28] *Cf.* Mr. Justice Rutledge's dissent, *id.,* at 33: "The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree."

what is not. It delegates that function to the employer (and, on the assumption that unions are also subject to the duty to "accommodate"), to the exclusive bargaining representative of all the employees. On them devolves the practical task of judging whether the practice for which the employee demands "accommodation" is the product of a religious belief which is "truly held." *Gillette* v. *United States,* 401 U.S. 437, 457 (1971). That necessarily involves two inquiries. One, whether the particular practice is "truly" a feature of the religion the claimant professes; two, whether the profession is itself "sincere." *Id.* As this Court said in *Gillette,* "we must * * * recognize that 'sincerity' is a concept that can bear only so much adjudicative weight." *Id.* And "the dangers of erratic decision making" (*id.* at 458), are compounded by the endless variety of practices which may be asserted as religious, and hence requiring accommodation.[29]

The dangers are further compounded by the fact that the employer and the union are not experts in the adjudication of such claims, and are perhaps disqualified by conflict of interest from passing upon them impartially. *Cf. Humphrey* v. *Moore,* 375 U.S. 335,

[29] The nature of the questions which may require decision is illustrated in *Williams* v. *Southern Union Gas Co.,* 529 F.2d 483, 485, 488 (10 Cir., 1976), *cert. denied* 45 L.W. 3363, where the employee's claim was that under his religion "he, rather than his employer, had the exclusive right to determine just what constituted an emergency." If, as appears, that was truly a "feature" of the employee's religion, the employer would trench upon § 701(j) if his judgment as to the existence of an "emergency" differed from that of the employee. Under the statute, the employer could then prevail only by proving "undue hardship."

349-350 (1964).[30] Yet to disqualify them would mean that even the most fraudulent demands for accommodation would have to be honored. *Cf. Sherbert* v. *Verner,* 374 U.S. 398, 407 (1963).

If "accommodation" is refused, as Judge Celebrezze said in *Cummins,* 516 F.2d at 559:

> "Disposition of complaints under the [1972] amendment will require inquiry [by EEOC and the courts] into the sincerity with which beliefs are held and force consideration of the validity of the religious nature of claims, procedures which are not favored and may themselves be improper because they put courts in review of religious matters."

The contrast between the complex and difficult nature of these judgments and the "[o]ccasional audits" characterized in *Roemer,* 44 L.W. at 4948, as "quick and nonjudgmental," could not be sharper.

(5) Political Division of the Work Force on Religious Lines

As construed below, the accommodation requirement "carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion." *Nyquist, supra,* 413 U.S. at 794:

> The Court in *Lemon* further emphasized that political division along religious lines is to be contrasted with the political diversity expected in a democratic society: "Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. Freund, Comment, Public Aid To Parochial Schools, 82 Harv. L. Rev. 1680, 1692 (1969)." 403 U.S. at 622. *Id.* at 796, n. 54.

[30] As the district court noted in this case (A. 187-188), under plaintiff's construction of the Randolph Amendment, unions would have "the duty to ignore their contract" (A. 189) in favor of any member of the bargaining unit upon his or her demand. Such a duty would be in square conflict with the union's own duty to defend and enforce the contract on behalf of all members of the bargaining unit. *Vaca* v. *Sipes,* 386 U.S. 171 (1967). Given that conflict, the union is hardly in a position to evaluate impartially the merits of an exemption claim.

Here, as in *Nyquist,* "the potential [of the accommodation requirement] for seriously divisive political consequences needs no elaboration." *Id.* at 797. Given the importance of comparative seniority, *Franks, supra,* resentment of senior employees against forfeiture of dearly won day-off and shift preference rights to accommodate the religious convictions or practices of juniors is inevitable. As the Sixth Circuit found in *Reid* v. *Memphis Publishing Company,* 521 F.2d 512, 516-517 (1975), *cert. denied,* 45 L.W. 3364:

> "Copyreaders having seniority usually do not want to work on Saturday. * * *
>
> "The Editor was of the opinion that to hire Reid, with all Saturdays off, would create a serious morale problem among the other nine copyreaders who would have seniority over Reid, but who, nevertheless, would be involuntarily assigned to take his place for Saturday work. The copyreaders could believe that Reid was being given favorable treatment over them, because of his religion, and that they were being discriminated against and were being penalized because they did not hold the same religious beliefs as Reid."

Whatever secular reasons a senior may have for opting for Saturdays off: whether it be shopping at

stores which are closed on Sunday, watching his son play football on the high school team or attending Saturday matinees at the theater, they satisfy him. Can anything but deep resentment be provoked by a governmental edict which weighs his junior's religious needs more heavily than his own secular ones and compels him to yield his liberty to their observance? And that resentment inevitably divides the work force politically along religious lines between the beneficiaries and the victims of the edict. Its repeal or retention becomes a political issue in the work place and, inevitably, in the Nation.

> "To have * * * [the labor force] divide on the issue * * * of [subordination of seniority rights to religious observance] would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections." *Lemon* v. *Kurtzman,* 403 U.S. 602, 622-623 (1971).

C. Free Exercise Values Do Not Entail, and Establishment Clause Values Forbid, Imposition of Hardships Upon or Conscription of Rights of Others To Facilitate Religious Practices.

The vulnerability of the Randolph Amendment under the Establishment Clause has been conceded by Leo Pfeffer, one of the Nation's leading Religion Clauses scholars and advocates, who filed a brief in support of the Amendment broadly construed in *Parker Seal Company* v. *Cummins,* No. 75-478, 45 L.W. 4009.[31] In *God, Caesar and the Constitution*

[31] Brief of the Synagogue Council of America and National Jewish Community Relations Advisory Council, *amici curiae.*

(Beacon Press, Boston, 1975), at 335, Mr. Pfeffer said:

> "Even in the absence of any 'undue hardship', the constitutionality of the amendment is not entirely beyond question. It is one thing for Congress to say that an applicant may not be denied a job in private industry merely because he is a Jew (or Negro or Puerto Rican); it is another thing to say that the employer must inconvenience himself or his business or suffer a hardship less than 'undue' so that the Jew can observe his own religion."

In other words, it is "fundamental error * * * [to] equate religious discrimination with failure to accomodate." *Dewey* v. *Reynolds Metal Company,* 429 F.2d 324, 335 (6 Cir., 1970), aff'd by an equally divided Court, 402 U.S. 689 (1971).

Mr. Pfeffer goes on to state (*id.*) that "[s]upport for upholding the constitutionality of the law may perhaps be found in two cases not involving religion," one sustaining the constitutionality of a statute forbidding employers to deduct wages for four hours absence for voting on election day;[32] the other sustaining the constitutionality of a statute requiring employers to make whole employees who serve on juries the difference between their jury pay and their regular wages.[33] Mr. Pfeffer perceives the distinction between these cases and

> "one involving a privately employed Sabbatarian who refuses to work on Saturdays, [to be that] in the former cases the community as a whole benefits when workers vote and serve on juries,

[32] *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U.S. 421 (1952).

[33] *Dean* v. *Gadsden Times Publishing Corp.,* 412 U.S. 543 (1973).

whereas in the latter case only the Sabbatarian is benefited. Yet the Supreme Court's recent liberality in Free Exercise cases may well induce it to uphold the 1972 amendment of the Civil Rights Act, as consistent with the spirit if not the letter of the laws involved in the *Day-Brite* and *Dean* cases." (*Id.*)

The necessity for resort to cases "not involving religion" is a glaring admission that the religion cases do not support the Amendment. Moreover, the suggested distinction is misleading; properly analyzed, the analogy cuts quite the other way. The operative difference is that voting and jury service are secular objectives within the power of the legislature to promote by any means which satisfy due process; in contrast, government cannot affirmatively promote religious observance by even the most "reasonable" means. The vice lies not in the fact that "only the Sabbatarian is benefited"—that would be true of a law which prohibited employment discrimination (in the classic motive sense) against Sabbatarians—it lies instead in conflict with the aims of the Establishment Clause which inheres in treating "a practical obstacle" to religious observance as the constitutional equivalent of "a practical obstacle to getting out the vote." *Day-Brite, supra,* 342 U.S. at 424-425, *Dean, supra,* 412 U.S. at 544.

Application to religious observance of the remedy prescribed by the legislatures to minimize practical deterrents to voting and jury service highlight the inconsistency with the Establishment Clause. Due process considerations aside, could Congress, consistently with the Establishment Clause, require an employer to compensate Sabbatarians at overtime or regular rates

of pay for time spent in Sabbath observance, as if it were time spent voting or serving on juries? Refraining from work on Saturday is costly to the Sabbatarian and that cost is undoubtedly a deterrent to Sabbath observance. If Congress, consistently with the Establishment Clause, could decide that "time out" for religious observance, like "time out for voting should cost the employee nothing" (*id.*), it would be free to impose on the employer, or, for that matter, upon his fellow workers who earn an overtime premium by working on Saturday when he makes nothing, the burden of compensating the Sabbatarian for his loss. Could it rationally be suggested that such a requirement can coexist with the prohibition against taxation to support religious observance?[34] That it cannot is, we submit, decisive against broad construction of the Randolph Amendment. It is not the *extent* of the burden imposed upon rights or property of others, but imposition *per se* on others of *any* burden to remove "practical obstacles" to religious observance, which the Establishment Clause condemns:

> "to borrow the words from Mr. Justice Rutledge's forceful dissent in *Everson* * * * 'Not the amount but "the principle of assessment was wrong.'"

[34] Inapposite due process analysis similarly marks the Brief for the United States and the Equal Employment Commission as *amici curiae* in *Cummins*. The argument (pp. 25-31) is that the accommodation requirement is "reasonable" inasmuch as the exemption for "undue hardship" lifts the obligation where religious practices affect work performance "substantially." However, as we have seen, the issue is not whether the balance struck between promoting religious observance and competing business and labor rights and interests is "reasonable," but on whether religious observance by some can constitutionally be promoted at the expense of others, even though the amount of the exaction is not "unreasonable."

330 U.S. at 40-41 (quoting from Madison's Memorial and Remonstrance)." *Nyquist, supra,* 413 U.S. at 797, n. 56.

(1) DISQUALIFICATION RESULTING FROM RELIGIOUS PRACTICES AT ODDS WITH NON-DISCRIMINATORY WORK REQUIREMENTS IS SELF-IMPOSED, NOT AN EFFECT OF DISCRIMINATION

It is argued, however, that Establishment Clause objections are overcome because the removal of "practical obstacles" is necessary to protect Free Exercise. The assumption underlying this argument is that the constitutional right freely to practice one's religion (*Cantwell* v. *Connecticut,* 310 U.S. 296, 303-304 (1940)), imports a correlative obligation of others to accept such burdens and make such sacrifices as the practice may impose on them.[35] That assumption goes against the grain of the most fundamental tenets of our jurisprudence.[36] It has been explicitly rejected in the series

[35] That the "principle of religious liberty" is limited to practices which do not "interfere [ ] with the rights of others" is initially recognized (albeit later disregarded) in the Brief of the Synagogue Council of America, etc., as *amici curiae* in *Cummins,* pp. 4-5. The Brief for the United States, etc. as *amici curiae* in *Cummins,* p. 36, would apparently restrict impermissible interference with the rights of others to their "religious liberties." Neither reason nor authority affords any support for this opportunistic perversion of principle.

[36] An identical fallacy underlies conclusions drawn from the unexceptionable premise that "[e]mployees should be educated to respect the conscientious beliefs of their fellow-workers—just as they must learn to accept co-employees regardless of race or national origin * * *." COLPA Brief *amicus curiae* in *Cummins,* p. 22. Respect for religious beliefs simply does not encompass willingness to sacrifice one's own rights and liberties to facilitate another's religious practices. Therefore, compulsion of sacrifice cannot be passed off as promotion of respect.

of cases in which Seventh Day Adventists and others demanded exemption from union shop dues obligations imposed by contract on all employees on the theory that since their religious convictions forbade them to pay dues to a union, their discharge for conscientious refusal interfered with their religious liberty.[37] In the earliest of these cases, *Otten, supra,* 205 F.2d at 61, Judge Learned Hand, speaking for the court, said:

> "The First Amendment protects one against action by the government, though even then, not in all circumstances; but it gives no one the right to insisit that in the pursuit of their own interests others must conform their conduct to his own religious necessities. A man might find it incompatible with his conscience to live in a city in which open saloons were licensed; yet he would have no constitutional right to insist that the saloons must be closed. He would have to leave the city or put up with the *iniquitous dens,* no matter what economic loss his change of domicil entailed. We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world."

[37] *Otten* v. *Baltimore & O. R. Co.,* 205 F.2d 58 (2d Cir. 1953); *Linscott* v. *Millers Falls Co.,* 440 F.2d 14 (1st Cir. 1971), *cert. denied,* 404 U.S. 872 (1971); *Gray* v. *Gulf, Mobile & Ohio R.R. Co.,* 429 F.2d 1064 (5th Cir. 1970); *Wicks* v. *Southern Pacific Co.,* 231 F.2d 130 (9th Cir. 1956), *cert. denied,* 351 U.S. 946 (1956); *Yott* v. *North American Rockwell Corporation,* 501 F.2d 398 (9th Cir. 1974); *Hammond* v. *United Papermakers & Paperworkers Union,* 462 F.2d 174 (6th Cir., 1972), *cert. denied,* 409 U.S. 1028 (1972).

The essence of that insight is that "hardships" and "practical obstacles" resulting from religious practices are consequences of voluntarism; they are natural, not artificial, barriers to free exercise. Freedom does not imply insulation from hardships which are indigenous to religious practice.[38] Election of poor parents to send their children to parochial school is an example. While the Free Exercise Clause guarantees that option, it does not, and cannot, touch the "hard-

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[38] Professor Freund has written:

> "Nor is there any general principle that requires the state to compensate those who out of religious conviction incur a handicap *under law*. Pupils in public schools may (perhaps must) be excused on their religious holidays; but it scarcely follows that those pupils are not responsible for the work they miss, even if they must resort to the expense of private tutoring. Businesses that close on Saturday as a religious observance and must close on Sunday under the law are disadvantaged materially because of religious faith; but exemption from the Sunday laws is not required. The state requires a certain formal ceremony to render a marriage valid in law, and provides magistrates at public expense who are available to satisfy this requirement. For those couples, however, whose religious faith compels them to hold an ecclesiastical ceremony, additional expense is involved, either to the couple or to their church or both. Must the state therefore compensate the minister or the bridegroom and bride? Would it help their case to insist that no true marriage can be celebrated without churchly blessing and that a ceremony before a judge is anti-religious, a profanation subsized with public money? Would not the answer be: If your religion prevents you from availing yourself of the public facility and impels you to make a financial sacrifice for the sake of your faith, surely the spirit of religion is the better served by your act." *Public Aid to Parochial Schools*, 82 Harv. L. Rev. 1680, 1687 (1969). (Emphasis added.)

A fortiori, is there no principle requiring compensation for handicaps resulting not from state imposed requirements but from competing interests of others. Encroachment upon such interests to promote free exercise is precisely what the Establishment Clause forbids.

ship" or "practical obstacle": payment of both public school taxes and parochial school fees. *Everson,* 330 U.S. at 18 (Jackson, J., dissenting); 58-59 (Rutledge, J., dissenting); *Nyquist,* 413 U.S. at 778-789; *Braunfeld* v. *Brown,* 366 U.S. at 606. Similarly, the Free Exercise Clause guarantees Amish parents against compulsory high school education of their children. *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972). But that does not imply that Amish children who for religious reasons do not receive a high school education may or must be considered qualified for, or hired into, government or private jobs requiring high school mathematics. To do so would not only impair those legitimate interests of the enterprise the requirement serves, but discriminate in favor of Amish applicants against others who lack high school mathematics. For the same reasons, while the Free Exercise Clause precludes denial of unemployment compensation to Sabbatarians because of their refusal of Saturday work, it cannot reasonably be argued that their freedom compels government or private employers to hire Sabbatarians for jobs requiring Saturday work, or in which the privilege of Saturdays or Sundays off is allocated by contract or by policy to the senior bidder. In sum, conscientious compulsion to observe religious practices may disqualify the practitioner from employment under neutral job-related principles and policies of legitimate interest to a government or private enterprise or its employees. Such principles and policies do not "operate invidiously to discriminate on the basis of * * * impermissible" criteria, *Griggs, supra,* 401 U.S. at 429, 431, and, consequently, removal of resultant disqualification is neither an incident nor a corollary of free exercise.

Inasmuch as the freedom guaranteed by the Free Exercise Clause does not encompass conscription of others to the religious observer's convenience, it does not[39] require government *qua* employer, at the expense of rights and interests of its other employees, discriminatorily to prefer religious observance over all other meritorious reasons for absence, or discriminatorily to excuse non-compliance with neutral, work-related, job policies, qualifications and requirements, to facilitate religious practices. The Government's defense of the position of the United States Postal Service as employer in the *Johnson* and *Mizell* cases, *supra,* and by implication, its *amicus* brief in *Cummins,* establish that this is also the Government's position. Of course, if the Free Exercise Clause bound government as employer so to discriminate, we would not contend that Congress is powerless to extend the same obligation to the private sector.

(2) THE ESTABLISHMENT CLAUSE DOES NOT ALLOW GOVERNMENT SPECIALLY TO PRIVILEGE RELIGIOUS OBSERVANCE UNDER THE GUISE OF COMBATTING DISCRIMINATION

It is argued, however, that even if such protection is not guaranteed by the Free Exercise Clause itself, Congress can provide it in the interest of promoting "free exercise values." The thesis is that government is entitled to protect religious observance and practices against "discrimination"; that "discrimination" as conceived in Title VII includes practices which are "discriminatory" in operation or effect, as well as those which are discriminatorily motivated; and that, therefore, government is entitled to define as "discriminatory" practices or requirements which conflict with religious observance unless the religious observance cannot be accommodated without "undue hardship." (Brief for the United States. etc., in *Cummins,* pp. 25-31.)

[39] Contrary to the position taken in the Brief for Seventh-Day Adventist Church as *amicus curiae* in *Cummins,* pp. 4, 5, 8.

Analytically, the difficulty with this approach is that it labels "discriminatory" job policies and requirements which are in fact neutral and work-related, merely because they affect workers and applicants who meet them differently from those who do not. Establishment Clause objections aside, that misnomer is vulnerable, both because it creates an "irrebutable presumption * * * contrary to fact", *U.S. Dept. of Agriculture* v. *Murry,* 413 U.S. 508, 514 (1973), and because it transfers from the disqualification inherent in the religious practice to the non-discriminatory work-related rule or policy the onus of adverse "effect".

This is illustrated in the Government's *amicus* brief in *Cummins* (p. 27):

> "The inquiry becomes more difficult when the employee's religious beliefs dictate a form of observance that would interfere to some degree with the normal performance of his jub duties. It seems clear enough, to take the most extreme example, that when an employee refuses to work at all because his religious beliefs forbid it, the employer's decision to discharge the employee would not constitute discrimination on the basis of the employee's religion. In that case there would be no means of accommodating the employee's religious observance while still maintaining the employment relationship."

But the reason discharge in the cited case "would not constitute discrimination" is not the impossibility of accommodating the religious observance to the employment relationship; it is that the requirement that work be performed is itself not "discriminatory"—inasmuch as "an employee who refuses to work at all because his religious beliefs forbid it" is treated no differently than an employee who refuses to work at all because he is lazy. The operative fact in both cases is the refusal to work, not the reason for it. Similarly, the "effect" of neutral work requirements and their enforcement by discharge, however hard on religious observers who fail to qualify, is not, and cannot be presumed to be, "discriminatory"[40] merely because non-observers do qualify. With respect to this neutral job qualification, observers and non-observers are differently, not similarly, situated.

The "concept of discrimination has traditionally meant" (*General Electric Co.* v. *Gilbert*, — U.S. —, 45 L.W. 4031, 4037), dissimilar treatment of those similarly situated or similar treatment of those differently situated. *Richardson* v. *Belcher*, 404 U.S. 78, 83 (1971); *Johnson* v. *Robinson*, 415 U.S. 361, 374-375, 383 (1974); *Fronterio* v. *Richardson*, 411 U.S. 677, 683 (1973). In some contexts, it has also meant favorable or adverse action taken on a prohibited ground or grounds. *Black's Law Dictionary* (Fourth Ed.), p. 553.[41] To define discrimination as failure to "accommodate" to persons differently situated in a relevant respect is a contradiction in terms; it brands nondiscrimination, discrimination.

[40] *U. S. Dept. of Agriculture* v. *Murry*, 413 U.S. 508, 513-514 (1973); *Vlandis* v. *Kline*, 412 U.S. 441, 446-449 (1973); *Stanley* v. *Illinois*, 405 U.S. 645, 656 (1972); *Bell* v. *Burson*, 402 U.S. 535 (1971).

[41] Because of the wide variety of applications, the term has not received "a uniform interpretation." See *Gilbert*, *supra*, 45 L.W. at 4041, n. 1 (Mr. Justice Stevens, dissenting). In *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 44-45 (1948), therein referred to, the term is used in the sense defined first above; in *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967) it is first used in that sense (at 32) and then in the second defined sense (at 33-34). We placed the term in the context of Title VII, *supra*, at pp. 31-36.

Plainly, susceptibility to accommodation without "undue hardship" of religious practices that "would interfere to some degree with the normal performance of job duties" is "a criterion wholly unrelated to" (*Vlandis supra*, 412 U.S. at 449) ascertaining "discrimination", unless the same degree of interference is treated differently when it is the result of religious practice than other causes. And, for the same reason, a rule which requires employees to work on Saturdays or Sundays cannot be branded "discriminatory in effect" as against Sabbatarians or Sunday worshippers, unless others who refuse for secular reasons to work on either of those days are exempt.

Thus, the Establishment Clause cannot be evaded by the device of labelling failure to accommodate to religious practices "discrimination." For if job requirements or qualifications are in fact even handed and relevant to job performance their incompatibility with religious observance is the product of neutrality, not discrimination, and the accommodation requirement imposes discrimination *in favor of* religion under the guise of eliminating discrimination *against* it.

This is not to say, as the Government's brief in *Cummins* would have it (Br. *op. cit. supra*, p. 27), that

refusal to accommodate to even the "most insignificant interference with job performance", such as an employee's religious need to "interrupt his work once or twice a day for a few moments of prayer or meditation" may never be considered discriminatory. It may indeed, if similar "momentary disruptions" by others, for other reasons, is tolerated, or if the consequences of momentary interruptions are really insignificant, for then refusals to accommodate may be considered a pretext, rather than the real reason, for the discharge.[42] But if a religious observance or practice *does* "interfere to some degree with the normal performance of * * * job duties," or with the allocation of benefits and burdens among employees in accordance with neutral principles such as seniority, it *does* have "a manifest relationship to the employment in question"; it cannot be labelled "irrelevant"; and the

[42] Thus, in *Jackson* v. *Veri Fresh Poultry, Inc.*, 304 F.Supp. 1276, 1278 (E.D. La. 1969), the unrefuted testimony of the plaintiff showed that she was fired by her foreman for not working after sundown on Fridays on the supposed authority of the plant superintendent—who had previously told her he did not think her taking off early would be a problem. In *Claybaugh* v. *Pacific Northwest Bell Telephone Co.*, 355 F. Supp. 1, 5 & n. 8 (D. Ore. 1973), the employer "could have accommodated Claybaugh as it accommodated other employees [for secular] activities." Again, in *Shaffield* v. *Northrop Worldwide Aircraft Services, Inc.*, 373 F. Supp. 937, 944 (M.D. Ala. 1974), "an extraordinarily strong case of discrimination," positions suitable for the aggrieved plaintiff, where "his religious practices would be no burden to the defendant or its work," were filled instead by new or recalled employees. Finally, in *Weitkenaut* v. *Goodyear Tire & Rubber Co.*, 381 F. Supp. 1284, 1286 (D. Vt. 1974), the employer refused to excuse the plaintiff one Friday night a month—although the employee was willing to take a job transfer and to arrange for willing and available substitutes, and the employer had previously adjusted the work schedules of others for both religious and non-religious reasons.

resultant barrier does *not* "operate invidiously to discriminate" (*Griggs* v. *Duke Power Co.*, 401 U.S. at 431), on the basis of religion. Indeed, barriers to employment flowing from *such* religious practices cannot reasonably be characterized as "artificial, arbitrary [or] unnecessary" (*id.* at 431), and refusal to "accommodate" to them cannot logically be branded "discriminatory." See pp. 33-34, *supra*.

Tension analogous to the Religious Clauses' between prohibited discrimination and prohibited support exists under the National Labor Relations Act, which, in Section 8(1) illegalizes employer discrimination against labor organizations and in Section 8(2) illegalizes employer support of labor organizations. In *NLRB* v. *Stowe Spinning Co.*, 336 U.S. 226 (1949), the Board found that the Company had discriminatorily denied the Union use of the only available meeting hall in a Company town, which had been given freely to others. To remedy the unfair labor practice, the Board ordered the Company, without qualification, simply to permit unions to use the hall upon request. The Court noted that "Sections 8(1) and 8(2) of the Act would seem to run into each other in the situation before us" (336 U.S. at 231). It resolved the dilemma by confining the decree to "discrimination", which it defined as causing "a union's application to be treated on a different basis than those of others similarly situated" (336 U.S. at 233). The Court said that an order which found "discrimination" in "mere denial of facilities", however harshly such denial might impinge on union organizational activity, simply "does not mean what it says" and implied that such an order would run afoul of the "support" prohibition.

The analogy to this case is virtually perfect. To label mere failure to accommodate to religious practices discriminatory is to support religion, not to outlaw discrimination.

D. The Religion Clause Cases Support Our Position

Nothing in the Religion Clause decisions is inconsistent with this analysis. For the most part, they involve government regulation aimed at secular objectives which affect religious institutions or religious observance only incidentally. In the nature of things, exemption of religious practices or property from general regulation may raise no more problems than inclusion. In these situations, as *Walz* v. *Tax Commission,* 397 U.S. 664 (1970) teaches, neither Free Exercise nor Establishment Clause aims may emerge entirely unscathed. Deep historical roots explain some apparent deviations (*id.,* at 672-673). But one thread emerges clearly from the cases: governmental compulsion discriminatorily to favor or oppose religion is prohibited absolutely. Until now, as Mr. Pfeffer apparently recognized, pp. 58-60, *supra,* no law so violative of that principle as the Randolph Amendment had even been presented for approval by this Court.

In *Zorach* v *Clauson,* 343 U.S. 306 (1952), the released time program did not involve coercion (343 U.S. at 311, n. 7 and accompanying text), and did not discriminatorily benefit religion, for the majority of the Court assumed that no hardship or burden was imposed upon those who opted against release by the absence of their fellows.[43]

[43] The majority refused to indulge Mr. Justice Jackson's speculation in dissent (343 U.S. at 324) that the program required the teachers and students who remained in school during the "released time" period to suspend normal school activities to assure that "the nonreligious attendants [would] not forge ahead of the church going absentees." The majority defined the parameters of its holding as follows (at 314): The school "can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here."

In *Sherbert* v. *Verner,* 374 U.S. 398 (1963), the Court held that inclusion of unemployed Sabbatarians in the class of those denied unemployment compensation because voluntarily unavailable for work amounted to punishment for refusing "to violate a cardinal principle of * * religious faith" and therefore impaired Free Exercise. 374 U.S. at 406. The rationale is implicit in the purpose of the denial of benefits: to induce or coerce unemployed persons to take available jobs. When jobs require Saturday work, the effect of that policy is to induce or coerce the religious practitioner to violate his religion; to withhold benefits because of his refusal "penalizes the free exercise of * * * constitutional liberties" (*id.*). The Court highlighted its finding that the denial in *Sherbert was* a penalty for religious observance by demonstrating that similar disqualification was *not* imposed upon Sunday worshippers (*id.*).

But jobs which require work on Saturday, Sunday, or Friday, and neutral rules and policies which allocate days off and shift preferences in accordance with seniority, are not designed to influence or affect employee conduct. The dilemma with which their existence confronts the Sabbatarian, the Sunday worshipper and the Mohammedan alike, *i.e.,* abandoning a precept of their religion or relinquishing the job, is of the employees' *own* making. Exclusion from the job is not "punishment" for refusal to succumb to any govern-

ment policy; it is the consequence of incompatability between religious observance and qualification for the job. The very incompatibility which disqualifies the religious observer makes the job unavailable to him. What posed the forbidden dilemma in *Sherbert* was that the State treated jobs as available to Sabbatarians despite their religious disqualification to take them. 374 U.S., n. 7, at 407-408.

In view of the majority's conclusion that inclusion of Sabbatarians in the disqualified class[44] constituted punishment violative of Free Exercise, to have considered that exclusion, because it benefited Sabbatarians alone, violative of the Establishment Clause, would have totally paralyzed decision. Accordingly, resolution necessarily turned on whether exemption breached "the governmental obligation of neutrality" (*id.* at 409) in other ways. On this point it was decisive that the appellees did not show or even argue that exemption of Sabbatarians would adversely affect rights, benefits or property of others.[45] Finally, while, in the majority view, non-exemption in *Sherbert*

[44] The majority found that the disqualified class included some but not all "personal reasons", other than religious observance, for unavailability for work. *Id.* at 401, n. 4. It followed that the inclusion of Sabbatarians reflected a value judgment as to the religious justification for refusing to work on Saturday.

[45] This is emphasized by the Court's observation (374 U.S. at 407), that

> appellees suggest no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work.

The Court treated this as a possible justification for encroachment upon Free Exercise, not as an Establishment Clause objection, and declined to consider it "because no such objection appears to have been made before the South Carolina Supreme Court" (*id.*).

would have impermissibly infringed Free Exercise, absence of the Randolph Amendments' "accommodation" requirement would not impair Free Exercise in government employment, let alone private employment, p. 66, *supra*. Hence, in this case, unlike *Sherbert*, there is no obstacle to full effectuation of Establishment Clause values.

In *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), the Court held that the Free Exercise Clause was breached by State compulsion of Amish parents to submit their children to high school education. Exemption was found not to offend the Establishment Clause because, 406 U.S. at 234, n. 22:

> "The purpose and effect of such an exemption are not to support, favor, advance, or assist the Amish, but to allow their centuries-old religious society, here long before the advent of any compulsory education, to survive free from the heavy impediment compliance with the Wisconsin compulsory education law would impose."

Here, again, the clash was between a secular objective of the State and the survival of a religion, not between claimed religious rights and conflicting asserted secular rights or privileges of others. None (except perhaps the Amish children themselves) was injured by their non-attendance at high school, and, of course, as we have seen, Wisconsin did not attempt to impose on others any burden resulting from their religious-based educational deficiency.

In *McGowan* v. *Maryland*, 366 U.S. 420 (1961) and *Braunfeld* v. *Brown*, 366 U.S. 599 (1961), compulsory Sunday closing laws were upheld against both Free

Exercise and Establishment Clause objections because the majority found that "their effect was * * * to promote the legitimate [secular] interest in a universal day of rest and recreation and * * * that they had only a remote and incidental effect advantageous to religious institutions. [366 U.S.] at 450" *Nyquist, supra,* 413 U.S. n. 39 at 784; *Braunfeld, supra,* 366 U.S. at 607.

It is argued that the implication in *Braunfeld, id.* at 608, that the State could have "cut an exception from the Sunday labor proscription for those people who, because of religious conviction, observe a day of rest other than Sunday," supports the accommodation requirement because it recognizes the propriety of elimination for religious observers of "economic disadvantages imposed by the present system." But the flaw in that argument is that the "system" which resulted in "economic disadvantages" to Sabbatarians in *Braunfeld* was imposed *by law,* however remote, indirect and incidental to the law's objective the effect on Sabbatarians may have been. While the Free Exercise Clause may not command (*Nyquist, supra,* 413 U.S. at 788), the Establishment Clause does not forbid, removal of economic disadvantages created or imposed *by law* any more than it prohibits exemption of religious institutions and property from taxes levied on profitmaking institutions. In this sense and in this context only it is true that, as the Chief Justice stated for the Court in *Walz* v. *Tax Commission,* 397 U.S. 664, 673 (1970):

> "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause."

Of course, the Randolph Amendment cannot be justified on the theory that it is designed to remove economic hardships imposed *by law* on religious practitioners in general or on Sabbatarians in particular. There are, of course, no laws which, in purpose or effect, single out religious practices for adverse treatment, and hence the special treatment—accommodation—mandated for all religious practices by the Randolph Amendment cannot be designed to mitigate the effect of any such laws. Nor does the Amendment operate to overcome any general legal handicap by which Sabbatarians, as distinguished from Sunday observers, are burdened. The Amendment applies as much to industries which operate on a seven day or on a six day as a five day basis and as much in states without as with a Sunday Closing Law.[46] Thus the economic disadvantages of which the Amendment would relieve religious practitioners result not from law but from the clash between the constraints of religious observance and job requirements or policies which are not discriminatory in purpose or in effect.

Finally, in *Gillette* v. *United States,* 401 U.S. 437, 450-455 (1971), the Court held consistent with the Establishment Clause draft exemption for conscientious objectors whose objection was grounded in religi-

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[46] As stated in the *Amicus* Brief for the Synagogue Council, etc. in *Cummins,* p. 12, Section 701 (j)

> "applies to Sunday-observing Christians employed by a Sabbatarian in a state which does not have a Sunday closing law, or in any of the many industries and other enterprises that are permitted to operate seven days a week."

It

> "benefits, for example, the conventional Sunday-observing Christian who happens to be employed by a Sabbatarian or by an employer who keeps his business open seven days a week." *Id.,* at 14.

ous conviction. But it did so on the theory that the object and effect of the law was to respect "supremacy of conscience," which the majority held to be a "neutral and secular" basis of distinction "in the sense of the Establishment Clause." It followed that the adverse impact of the exemption of objectors who qualified upon non-objectors and on objectors who did not was not a result of discrimination on the basis of religion. The premise underlying the entire opinion is that if the Court had found that religious observance was the basis of distinction between those who were exempted and those who were not, both the benefit to religious objectors and the resulting detriment to the non-exempt class would have condemned the legislation on Establishment Clause grounds.

Furthermore, in *Gillette*, as in *Sherbert, Yoder, McGowan*, and *Braunfeld*, there was ground to argue that failure to exempt conscientious objectors would violate the Free Exercise Clause, for the restraints flowed from government regulation—the draft—rather than from non-discriminatory circumstances and conditions which Government did not create.[47]

[47] The suggestion of COLPA in its brief *amicus curiae* in *Cummins*, pp. 11-16, that a law which "assist[s] religious believers" should not be held to violate the Establishment Clause if it goes no further than to promote "free exercise values" would eliminate the "tension" between the Free Exercise Clause and the Establishment Clause by removing the restraints which are the latter's "aims", pp. 50-58, *supra*. That approach finds no support in the dissenting opinion of Mr. Justice White in *Welsh* v. *United States*, 398 U.S. 333, 367 (1970), on which it purportedly rests. Indeed, his opinion stresses that protection of "free exercise values" may soften the impact of the Establishment Clause only where Congress elects to relieve "religious believers from the burdens of [a] law" which not merely prohibits but "commands" actions "forbidden by a man's religion." *Id.* at 373. That is to adhere to, not reject, the view that promotion of free exercise values does not authorize relief from "practical obstacles" to religious observance which *are not* imposed by *law*, and which neither prohibit nor compel action by the religious observer.

For this reason, likewise, these cases lend no support to a law that requires "the employer * * * [to] inconvenience himself or his business or suffer a hardship less than "undue' so that the Jew can observe his own religion." Pfeffer, *supra*, p. 59.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed with direction to dismiss the complaint.

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FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1126

TRANS WORLD AIRLINES, INC.,
Petitioner,

VS.

LARRY G. HARDISON, ET AL.,
Respondents.

No. 75-1385

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, ET AL.,
Petitioners,

VS.

LARRY G. HARDISON, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In the Supreme Court of the United States

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No. 75-1126

TRANS WORLD AIRLINES, INC.,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Statement of Facts

Larry G. Hardison was employed by Trans World Airlines (TWA) on June 5, 1967, as a stores clerk in Building No. 1 at TWA's Kansas City Overhaul Base, located at Kansas City International Airport. (A.22, 23). He subsequently became a member of the International Associa-

tion of Machinists and Aerospace Workers, AFL-CIO, International Association of Machinists and Aerospace Workers District 142, and International Association of Machinists and Aerospace Workers Local Lodge 1650 (hereinafter collectively referred to as the "union" or "IAM"). (A.22, 25).

Hardison's employment with TWA was covered by a collective bargaining agreement between TWA and the IAM, dated August 24, 1966. (A.22, 210-218). That contract provided *inter alia*:

> "The principle of seniority shall apply in the application of this Agreement in all reductions or increases of force, preference of shift assignment, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement." (A.214).

At the time Hardison applied for employment, he was not a member of the Worldwide Church of God, and indicated on his employment application that he would be willing to work weekend shifts. (A.25). Until the time that Hardison joined the Worldwide Church of God, he did in fact, when scheduled, work Friday evenings and Saturdays. (A.66-67, 73-74).

Hardison began to study the teachings of the Worldwide Church of God in the spring of 1968. (A.66). One of the chief tenets of this particular religion is that no servile work could be performed on the Sabbath, which is observed from sunset Friday to sunset Saturday. (A.67). Additionally there are seven designated "Holy days" throughout the calendar year which are observed in the same fashion. (A.25).

In April, 1968, when Hardison began studying the teachings of the Worldwide Church of God, he informed

Everett Kussman, Manager of TWA's Stores System, of his belief in observance of the Sabbath from sunset Friday to sunset Saturday. (A.27-28). Hardison continued to study the teachings of the Worldwide Church of God, and again in September, 1968, he informed Mr. Kussman of the nature of his religious observances including his Sabbath and holy days. (A.28-29). At that time Kussman had stated that he would be agreeable to allowing Hardison to switch his holy days for all contract-provided holidays. Kussman's commitment was not a blanket accommodation, but rather a commitment to "consider" Hardison's holiday requests. (A.28-29).

Hardison officially joined the Worldwide Church of God in September, 1968 and at that time he voluntarily transferred to the graveyard shift (11:00 P.M. to 7:30 A.M.) so as to avoid any conflicts between his Sabbath observance and his scheduled working hours. (A.66-67). On the graveyard shift Hardison was off work from 7:00 A.M. Friday to 11:30 P.M. Sunday. (A.66-67). This shift change thus eliminated the need for the Company to provide accommodation for Hardison's Sabbath observance.

In December, 1968, Hardison voluntarily transferred from the Stores Stock Room Section in Building No. 1 to the Stores Progress Section in Building No. 2, so that he would be able to work the day shift (7:00 A.M. to 3:30 P.M.). (A.67-68). This transfer also allowed Hardison to fulfill his religious observances since he was scheduled to work Monday through Friday.

The transfer to Building No. 2 affected Hardison's seniority position, since the Building No. 2 Stores Progress Section and the Building No. 1 Stores Stock Room Section were in separate seniority groups. (A.23, 75, 229, 248). Hardison moved from a relatively high seniority position in Building No. 1 to the second lowest seniority position

in Building No. 2. (A.24, 239, 248). Hardison experienced no difficulty in observing his Sabbath until March, 1969, when Mr. Wyatt, the man with less seniority than Hardison, went on vacation. Hardison, being next in line of seniority, was scheduled to work Wyatt's position which included working Friday evenings and Saturdays. (A.68). This would have required Hardison to violate his Sabbath. (A.68).

On March 6, 1969, realizing that the vacation schedule would create a problem with Hardison's observance of the Sabbath, Mr. Kussman initiated a meeting with Hardison and the union steward, James Tinder. The purpose of that meeting, according to Kussman, was " 'to make sure that we had no misunderstanding' about what Hardison's obligations were." (A.126, IAM Brief 8).

The discussion at that meeting centered around what Hardison could do to accommodate himself, and whether it would be acceptable to the Company and the Union. (A.126-128). First, Kussman suggested that Hardison exchange jobs or shifts with another employee to avoid Sabbath work. (A.127). The Union would not agree to any such exchange, unless it was made under the standard provisions of the collective bargaining agreement—that is, if another job was put up for bid, Hardison could bid for it and obtain it only if he was the most senior employee to bid. (A.83-85, 126-128). Since there were no jobs open for bid, and since Hardison didn't have sufficient seniority to bid on any other jobs, the Union's veto effectively blocked Kussman's suggestion. (A.77, 83, 91-92, 229). No special procedure would be employed to accommodate Hardison's Sabbath observance.

The second alternative was proposed by Hardison himself. He suggested that he be allowed to have Saturdays

off without pay; the Union did not object to that proposal, but the Company would not agree. (A.82-83, 127-128, 229).

A third alternative was also proposed by Mr. Hardison. He offered to work six days per week, without any extra pay or overtime pay, so long as he could have the Sabbath off. (A.71). Hardison in fact "indicated that he was willing to work any hours, take any combination of days off, and work any shift as long as he did not have to work between sundown Friday and sundown Saturday." (A.36). The Union rejected this proposal. (A.71).

Still another alternative was proposed by Hardison. Mr. Hardison knew of an employee on the graveyard shift who was unhappy with his shift. Hardison suggested that he and that employee be allowed to swap shifts. Again, however, the Union objected to this proposed "swap" claiming that it would "adversely affect the seniority rights" of other persons. (A.83-84, 229, IAM Brief 9).

From this meeting it was concluded that nothing could be done to accommodate Hardison's Sabbath observance. (A.31, 229). Even though there were more than 200 people available who could perform Hardison's job, there was no attempt to contact any of them, to propose or arrange for a swap. (A.134, 258). The Company's policy on accommodation of Saturday Sabbath observance was to "allow the person to accommodate himself." Where that is impossible, they would "terminate the person because he couldn't meet his work schedule." (A.154-155).

Hardison was absent from his scheduled work on his Sabbath on March 8 and March 15. He had asked to be excused for both days but was refused. (A.31-32).

A meeting was held with Hardison and TWA and IAM personnel on March 31, 1969, after which W. J. Butcher, the Supervisor of Stores Planning and Control, wrote

Hardison a letter. While acknowledging Hardison's religious beliefs, Butcher informed him that if he did not report for work on March 22, a discharge hearing would be held. (A.32-34). Hardison was absent on March 22 and a discharge hearing was scheduled for March 28, 1969. (A.34).

Hardison, prior to the discharge hearing, voluntarily transferred to the twilight (3:00 p.m.-11:30 p.m.) shift. In keeping with his religious beliefs he left work at sundown on Friday, March 28, 1969. (A.170-171).

The Union's position at the discharge hearing was to plead for leniency. It did not matter to the Union whether the Company violated the Civil Rights Act of 1964. (A.169). In fact, at the discharge hearing, there was no mention made by the Union of a possible violation of the Civil Rights Act of 1964. (A.174). The discharge was effective April 2, 1969.

Proceedings Below

After having exhausted his administrative remedies under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., Hardison filed suit in the United States District Court for the Western District of Missouri on February 10, 1972. He charged that both TWA and the Union discriminated against him because of his religious beliefs. After the filing of extensive stipulations of fact, the case was tried on October 18, 1972.

The district court, while upholding the constitutional validity of the Act and applicable EEOC guidelines, found that the Company and the Union had fulfilled their obligations to accommodate the religious beliefs of the employee. The court reasoned that although the EEOC regulation 29 C.F.R. §1605.1 speaks in terms of the employer's duty to accommodate, the provision should be interpreted to apply to unions as well as to employers. In this case, however,

the court concluded that both the Union and the Company had provided reasonable accommodation. Allowing Hardison to swap shifts or change jobs would have required the Union to ignore seniority provisions which the court found were not designed with the intention to discriminate. The court held that Title VII did not require the Union to ignore provisions of a bona fide seniority system. This, it held, would impose an undue hardship on the Union. As to the other alternatives the trial court found that an undue hardship would have resulted to the Company if Hardison had been allowed to work a four-day week. If his position had been left vacant, the Company would have been deprived of "its regular manpower," and likewise replacing Hardison would have worked an undue hardship since TWA would have to pay overtime wages to the replacement. Thus, it was concluded that both the Union and the Company had reasonably accommodated Hardison.

In its review, the Eighth Circuit Court of Appeals held that the Act and the applicable regulations did not violate the Establishment Clause of the First Amendment. The Court of Appeals, relying heavily on the trial court's findings of fact, concluded that the employer had not made a reasonable effort to accommodate Hardison's religious beliefs. It found that there were a number of possible accommodations within the framework of the collective bargaining agreement which could have been offered to Hardison. It was also held that a collective bargaining agreement whose seniority provisions precluded *any* reasonable accommodation is prima facie evidence of a violation of the Act by both the Union and the Company. Further, a union may be liable if it purposefully acts or refuses to act in a manner which obstructs reasonable accommodation efforts by the employer. The Court of Appeals did not review the effect of the Union's refusal to ignore the seniority provisions since that issue was not raised on appeal.

SUMMARY OF ARGUMENT

I.A. A collective bargaining agreement does not exempt a union or an employer from the duty to reasonably accommodate the religious beliefs of an employee. The Civil Rights Act of 1964 is paramount over a collective bargaining agreement which makes no provision for the reasonable accommodation of an employee's religious observances, and the seniority rights under a collective bargaining agreement must yield to an act of Congress furthering a strong public policy. Thus, neither a union nor an employer can claim "undue hardship" based upon an inflexible collective bargaining agreement.

B. Under Section 701(j), the employer has the burden of proving that reasonable accommodation would result in an undue hardship. That burden cannot be met by mere speculation as to what might have happened if the employee's religious beliefs had been accommodated, when several reasonable alternatives appear to have existed. An employer cannot speculate that a shift swap would have resulted in complaints from other employees, where the employer failed to ascertain whether one of 200 qualified employees was willing to replace the Sabbatarian at his job. Neither can the employer claim that vacancy in the Sabbatarian's job would have caused an undue hardship, when the vacancy could have been filled by another qualified employee or by a supervisor on the same shift. Where it appears that accommodation would have resulted in payment of overtime wages for a shift or part of a shift, that showing does not in itself, amount to a showing of undue hardship. Reasonable accommodation may result in some inconvenience or costs to the employer, and whether that inconvenience or expense amounts to undue hardship must be determined on the facts of each case. But the payment of overtime wages for the accommodation of only one employee is not a showing of undue hardship.

II. The duty of reasonable accommodation does not violate the establishment clause of the First Amendment. It meets each requirement of the three-fold test applied by this Court to laws challenged under the establishment clause. First, the law reflects a clearly secular purpose. No particular religion is favored by Section 701(j). In fact, the law advances neutrality—placing Sabbatarians on an equal footing with majoritarians, thereby allowing them the *same* freedom to exercise their religious beliefs without being deprived of employment opportunities. Thus, Section 701(j) does not advance any particular religion; rather, it insures equal employment opportunities for *all* individuals, regardless of their religious beliefs. Secondly, the reasonable accommodation duty has a primary effect that neither advances nor inhibits religion. The effect of Section 701(j) is that *employment security* is afforded to individuals—not to any particular church. The employment security derived from Section 701(j) is afforded to all individuals. Any indirect benefits derived by religious institutions do not make the law Constitutionally invalid. Here, Congress simply intended to afford all individuals equal employment opportunities, without regard for their religious preferences. Lastly, the duty imposed by Section 701(j) does not involve excessive government entanglement. The duty is placed upon the employer, and not the government, to provide reasonable accommodation for employees' religious beliefs. The only government involvement is that of the Equal Employment Opportunity Commission and the courts, in reviewing the employer's compliance with the law. That involvement is by no means excessive, and is incidental to the primary obligation placed upon the employer. Thus, Section 701(j), which fosters employment opportunities for all individuals without regard for their religious preferences, is and should be declared by this Court to be Constitutionally valid.

ARGUMENT

I. A Collective Bargaining Agreement's Seniority Provisions Which Preclude Any Reasonable Accommodation for Religious Observance by Employees Cannot Be Used to Frustrate the Obligation of an Employer Under Sec. 701(j) of the 1964 Civil Rights Act.

A. The Union's contention elevates a privately negotiated collective bargaining agreement to a position higher than that of an Act of Congress.

The Union does not deny that there were accommodations available for Hardison. However, the various alternatives noted by the Court of Appeals are rejected by the Union in its brief because they would violate or abridge "contractual rights of other employees". (IAM Brief 25). The Union's position throughout this litigation has been that there were not any accommodations within the collective bargaining agreement "which would not violate the contract rights of other employees". (IAM Brief 9, A.229-77, 84, 91-92).

Under the guise of protecting the contractual rights of non-Sabbatarians, the Union is exempting its Sabbatarian members from coverage of Section 701(j) of the Civil Rights Act of 1964. The Union emphasizes the fact that Hardison voluntarily transferred from the graveyard shift to the day shift where he had less seniority. (A.229). That contention implies that the duty of religious accommodation attempts are only feasible with senior employees. This surely is not what Congress intended since Section 701(j) applies not only to current employees who may have sufficient seniority, but also to "prospective employees" who have no seniority. The Union would have this Court interpret the Act to mean that a seven-day operation, such as that of TWA, would never have to hire Sabbatarians. As stated by the Court of Appeals:

> If Saturday work inevitably falls to the employees with lowest seniority, one may well ask whether such seniority provisions would not effectively preclude TWA from ever hiring those Seventh Day Adventists, Orthodox Jews, and members of the Worldwide Church of God whose religious convictions preclude work from sundown on Friday until sundown on Saturday. *It is no answer to such a person, or to the statute itself, that if he compromises his religious beliefs for a time he may develop enough seniority to practice them again.* (Emphasis added) (A.260).

Respondent will admit that an important role is played by collective bargaining units in stabilizing the work force, securing better working conditions and generally helping a large number of working people. But a collective bargaining agreement should never take precedence over an Act of Congress. *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), cert. dismissed, 404 U.S. 1006 (1971); *Local 189, United Papermakers & Paperworkers, AFL-CIO* v. *United States*, 416 F.2d 980 (5th Cir. 1969) and *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505 (E.D.Va. 1968).

This Court made it clear in *Franks* v. *Bowman Transporation Co., Inc.*, 424 U.S. 747, 96 S.Ct. 1251 (1976), that collective bargaining agreements and seniority systems may be modified by statute or court action. As stated there:

> Certainly there is no argument that the award of retroactive seniority to the victims of hiring discrimination in any way deprives other employees of indefeasibly vested rights conferred by the employment contract.

This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest.[40] Tilton v. Missouri Pacific Railroad Co., 376 U.S. 169 (1964) (construing §§9(c)(1) and 9(c)(2) of the Universal Military Training and Service Act of 1948, 50 U.S.C. §§459(c)(1)-(2), which provided that a reemployed returning veteran should enjoy the seniority status he would have acquired but for his absence in military service): Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946) (construing the comparable provision of the Selective Training and Service Act of 1940). The Court has also held that a collective bargaining agreement may go further, enhancing the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement. Ford Motor Company v. Huffman, 345 U.S. 330 (1953). *And the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the "highest priority," is certainly no less than in other areas of public policy interests.* Pellicer v. Brotherhood of Railway and Steamship Clerks, 217 F.2d 205 (CA5, 1954) cert. denied, 349 U.S. 912 (1955). See also Cooper and Sobol, 82 Harv. L. Rev., at 1605.

96 S.Ct. at 1271. (Emphasis added).

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40. [C]laims under Title VII involve the vindication of a major public interest. . . ." Section-By-Section Analysis, accompanying The Equal Employment Opportunity Act of 1972—Conference Report, 118 Cong. Rec. 7166, 7168 (1972).

The Court of Appeals did not give much weight to the argument that Hardison affected the duty of the employer by changing shifts[1], since to deny him that right would have been "to discriminate against [him] with respect to his . . . conditions, or privileges of employment because of [his] . . . religion." 42 U.S.C. 2000e-2(a)(1) (A.255).

The Union assumes the posture that its collective bargaining agreement is sacrosanct and above federal law. They state: "If that assignment (Saturday work) is considered undesirable, the employer, or if the employees are represented by a Union, the Collective Bargaining Agreement will have to state the method for determining who shall be required to fill that undesired assignment." (IAM Brief 16).

What about Congress? Are we to totally ignore the *affirmative* duty they placed on an employer to "make reasonable accommodations" to the religious needs of employees where those accommodations "can be made without undue hardship to the employer's business?"

Congress did not provide that Section 701(j) applies only in the absence of conflicting collective bargaining agreements. It can be assumed that Congress was aware of the existence of collective bargaining agreements when it enacted Section 701(j). It also can be assumed that Congress was aware that its action would have an effect on the employment relationship between employers and their employees with respect to the employee's religion. Senator Randolph, the sponsor wanted:

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1. It should be noted that although Hardison changed shifts, he still was not required to work on his Sabbath since he changed to a Monday to Friday schedule.

"to assume that freedom from religious discrimination in the employment of workers is for all time guaranteed by law. . ."

and

"to resolve by legislation—and in a way I think was originally intended by the [1964] Civil Rights Act—[an issue] which the courts apparently have not resolved." 118 Cong. Rec. 705, 706.

That "issue" was the extent to which Title VII's ban on religious discrimination limited an employer's freedom to discharge or refuse to hire an individual whose religious practices or observances conflicted with the employer's work schedules. Senator Randolph referred to *Dewey* v. *Reynolds Metals Co.*, 402 U.S. 689 (1971), which affirmed by an equally divided Court a Sixth Circuit decision[2], sustaining the lawfulness of an employer's discharge of an employee who, for religious reasons refused to work on Sundays.[3]

This Court held in *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971):

> What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of race or other impermissible classification. 401 U.S. at 430.

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2. 429 F.2d 324 (6th Cir. 1970).

3. Senator Randolph inserted into the Congressional Record the Sixth Circuit's opinion and this Court's order of affirmance in *Dewey*, a district court opinion in a similar case, and the EEOC's guidelines on religious discrimination. (which imposed a reasonable accommodation requirement nearly identical to that proposed by Senator Randolph). 118 Cong. Rec. 706-730.

In this instance the "barrier" is a collective bargaining agreement that effectively denies employees the protection intended by Congress when it enacted Section 701(j).

The Union recreated the fabled offer of milk to the stork and the fox. It took the position that it was "totally agreeable to any adjustment that could be made for plaintiff so long as it didn't deprive another employee of seniority rights". (A.91). That was the good news. The bad news was, there were no such adjustments. (A.229).

Griggs also states that "discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." 401 U.S. at 431.

The Union argues that this Court was saying that an employer was not under any duty to accommodate the religious beliefs of its employees. When Congress passed Section 701(j) in 1972, they specifically spelled out what the duty of an employer was to be. As stated earlier, one of the purposes behind the enactment of the 1972 enactment was to clarify what Congress meant.

It can hardly be disputed that the superimposing of a collective bargaining agreement over the duty to accommodate has a discriminatory effect upon Sabbatarians.

Policies which have a discriminatory effect are seldom sustained. *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970); *United States* v. *International Brotherhood of Electrical Workers, Local 38*, 428 F.2d 144 (6th Cir. 1970), cert. denied, 400 U.S. 943 (1970); *Weeks* v. *Southern Bell Telephone & Telegraph Company*, 408 F.2d 228 (5th Cir. 1969); *Bowe* v. *Colgate Palmolive Company*, 416 F.2d 711 (7th Cir. 1969); *Cheatwood* v. *South Central Bell Telephone & Telegraph Com-*

pany, 303 F.Supp. 754 (D.Ala. 1969); *Meadows* v. *Ford Motor Co.*, 510 F.2d 939 (6th Cir. 1975).

This Court did not in *General Electric Co.* v. *Gilbert*, ... U.S. ....., 97 S.Ct. 401 (1976), say that "effect" was no longer a controlling principle in Title VII cases. Rather it held that the respondents, in *that* case, had not met their burden of proof.

There is no question that in this case that the burden of proof has been met by Hardison. The Union even acknowledges that "Sabbatarians are disadvantaged because of their inability to work on Saturday." (IAM Brief 35). That "self-imposed inability" is the result of the employees' exercising rights guaranteed by the Constitution of the United States to freely exercise their religion.

Congress was aware that since we live in a society that generally acknowledges Sunday as a Sabbath, that Saturday Sabbatarians are placed at a disadvantge. *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Gallagher* v. *Crown Kosher Market*, 366 U.S. 617 (1961); *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582 (1961).

By enacting this statute, Congress intended to place Sabbatarians on an equal footing with the majority who can freely exercise their religion.

Under the Union's theory of the case there can never be such a thing as an accommodation. The Union felt it was under no obligation to even see if a voluntary swap could be made.

It would seem that the detailed analysis given to the previous EEOC guidelines is not very helpful, nor really germane, since Congress has told us what they meant, regardless of how the administrative agencies or the Courts interpreted the previous guidelines.

The purpose behind the "religious accommodation" provision is to insure that a person is not discriminated against because of the practice of his religion. The purpose behind Title VII, among other things, was to see that the job market was not restricted to persons because of their religion. The Union seems to feel that these goals are unimportant if accommodations towards that goal violate a collective bargaining agreement.

The Union contends that Congress did not want to force another employee to work on Saturday if the employee chose otherwise. There is absolutely nothing in the record to support the conclusion that someone would have been "forced" to work. There was no attempt on the part of the Union to discover whether any of the two hundred qualified employees would have been willing to swap shifts with Hardison. A voluntary swap of shifts between two persons would not destroy the bona fide seniority systems of Section 703(h).

The Union concedes that Section 701(j) might have some validity if the resulting transfers were voluntary. However, under their interpretation of their collective bargaining agreement, there can never be a voluntary transfer for the purpose of accommodating a person's religious observance.[4]

B. There was no attempt on the part of the Company to reasonably accommodate the religious practices of Hardison.

The duty placed on an employer by Congress is to "demonstrate that he is unable to reasonably accommo-

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4. Hardison's supervisor, Kussman, admitted in response to a question from the Court that without the Union seniority requirements "there would not be that problem" of finding volunteers who would have been willing to have traded Saturday off for Sunday off. (A.140).

date (to) an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. §2000e(j).

How TWA construed that burden is illustrated by the following exchange between Judge Oliver and Mr. Stone, the Director of Industrial Relations:

> The Court: What is TWA's policy, Mr. Stone, as to recognition of conscientious religious scruples against working on Saturday?
>
> The Witness: Well, in any instance that I have known about where people had problems of that kind, except this instance, they have been able to adjust them by actually observing the day they preferred.
>
> . . .
>
> The Court: I say, what is your policy if they can't be adjusted by reason of the application of the seniority provisions in your Union contract?
>
> The Witness: Well, we would try wherever we could to make adjustments, *allow the person to accommodate himself*. (Emphasis added.) (A.154-155).

Hardison, when he went to his employer to reach some accommodation, offered to work any hours, take any combination of days off, and work any shift so long as he did not have to work on his Sabbath. (A.36).

The only attempts at accommodation made by TWA were that they (1) agreed to the Union steward seeking a swap or days off (2) agreed to allow holy days off if Hardison worked Christian holy days.[5] (A.28). TWA contends that it fulfilled its obligation by doing this, and nothing more should be required of the Company. That's

5. Even the offer to allow Hardison off his holy days was conditional, although it never became an issue. (A.30).

about as much, or little, effort as was made in *Jackson* v. *Veri-Fresh Poultry, Inc.*, 304 F.Supp. 1276 (E.D.La. 1969) and in *Claybaugh* v. *Pacific Northwest Bell Telephone Co.*, 355 F.Supp. 1 (D.Ore. 1973).

TWA appears to concede that "it is virtually impossible for an employer to demonstrate that an actual accommodation without undue hardship could not be made, particularly if the employer is large." (TWA Brief 47)[6] That may well be the point that Congress was trying to make in enacting this legislation.

TWA takes the position that by agreeing to waive the seniority provisions of the contract it fulfilled its duty, even though the Union refused to acquiesce. It is admitted by TWA that no real accommodation effort was attempted.

Several possible accommodations were discussed but none were ever instituted. Hardison stood ready to do whatever was requested of him. TWA said he could change shifts. He was agreeable. The Union wasn't. TWA said he could change jobs. He was agreeable. The Union wasn't. The Union said he could work a four-day week. He was agreeable. TWA wasn't. TWA said he could work a six day week. He was agreeable. The Union wasn't.

The only thing that TWA and the Union agreed on was that Hardison couldn't be accommodated because of the provisions of the collective bargaining agreement.

Although TWA conceded there were two hundred workers who could replace Hardison, no attempt was made to contact any of the two hundred to see if *one* was willing to work his shift. TWA never even asked for a variance

6. *See also*: Edwards & Kaplan, Religious Discrimination and the Role of Arbitration Under Title VII, 69 Mich. L. Rev. 599 (1971).

to permit a shift swap for Hardison. (A.261). Where two hundred employees were qualified to perform Hardison's job, it is suggested that TWA's failure to seek a variance is a violation of its duty of reasonable accomodation. Certainly TWA cannot claim that it comes within the EEOC guideline which provides in part that an undue hardship "may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications . . . " 29 C.F.R. §1605.1(a)(3). In fact, the opposite is true. *No* undue hardship has been demonstrated by this employer when it totally failed to inquire of two hundred "qualified" employees, and when it failed to seek a variance.

In its brief, TWA argues against the alternatives specifically noted by the Eighth Circuit. (TWA brief 53). Specifically, the Court of Appeals observed that TWA could have permitted Hardison to work a four-day week. Hardison was willing, but TWA wasn't. (A.256). TWA argues that this accommodation was not feasible because of the provision in its collective bargaining agreement which provides that "Except in an emergency, an employee will not be required to work overtime against his wishes." (TWA brief 53, A.215-216). Yet TWA didn't even inquire of two hundred available employees. It did *not* demonstrate that this alternative would have required an employee to work "against his wishes." Perhaps one or more employees would have volunteered to work overtime. TWA totally failed to prove that accommodation would have resulted in any employee working overtime "against his wishes."

Further, it is interesting to note that TWA *could* have required an employee to work overtime "against his wishes," if the situation was "an emergency". TWA has argued to this Court and the courts below that it would

have been an "undue hardship" on the Company to have Hardison's job vacant for a shift or part of a shift. Yet if indeed this were true, the collective bargaining agreement provided the solution. If Hardison's absence presented an "undue hardship," then the Company could have *required* an employee to work overtime, if in fact none volunteered for the overtime (which TWA failed to prove), pursuant to the emergency overtime clause of the collective bargaining agreement.

The Union, in its brief, concedes that there was another alternative available within the terms of the collective bargaining agreement. TWA could have filled Hardison's job with supervisory personnel. (IAM brief 25, A.256). This alternative is rejected, however, because it would cause some other shop function to suffer. Again, however, TWA failed to meet its burden by demonstrating that this alternative would in fact create that effect. The alternative must be put to a test by the employer.

Lastly, it is suggested that the payment of overtime wages for one shift per week for one employee does *not* constitute "undue hardship" within the meaning of Section 701(j) or 29 C.F.R. §1605.1(a)(3). The District Court stated that "the duty to accommodate does not require that an employer make every effort short of going out of business to permit his employees to stay on the job and also observe their religion." (A.240). But, as the Court of Appeals observed:

> The regulation does not preclude some cost to the employer any more than it precludes some degree of inconvenience to effect a reasonable accommodation. (A.258).

This Court made it clear in *Franks* v. *Bowman Transportation Co., Inc., supra,* that seniority rights are not

"indefeasibly vested," and such rights and employee expectations may be modified or give way to "statutes furthering a strong public policy." 96 S.Ct. at 1271. The same must be true of the employer's "expectations." No one denies that the duty of reasonable accommodation may result in some inconvenience or cost to the employer. But the employer's duty under Section 701(j) *is* reasonable accommodation. The payment of overtime wages for a shift or part of a shift, even if required for the employer to effect accommodation (which TWA did not prove in this case) does not amount to "undue hardship." No evidence was offered by TWA, which would demonstrate that this additional cost would have put the company "out of business." In fact, the evidence reflected that Hardison was the *only* employee of TWA whose religious beliefs might have necessitated payment of overtime wages. It can hardly be said that this evidence demonstrates the type of "undue hardship" exception envisioned by Congress.

If it is true that the "employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted,"[7] then TWA has no ground at all on which to stand. In this case, TWA never attempted an accommodation of Hardison's religious beliefs. He was fired the first time TWA was called upon to provide some accommodation for Hardison. Up until March, 1969, Hardison had "accommodated himself," in accordance with TWA's policy. (A.154-155).

TWA's chief concern appears to be speculation on what *might* have happened if Hardison's religious beliefs had been accommodated. The company relies upon antici-

7. *Draper* v. *U. S. Pipe & Foundry Co.*, 527 F.2d 515 (6th Cir. 1975); *Shaffield* v. *Northrop Worldwide Aircraft Services, Inc.*, 373 F.Supp. 937, 941-2 (M.D.Ala. 1974).

pated grumblings of other employees which might have occurred. Such "grumblings" are not an "undue hardship" contemplated by the statute. *Cummins* v. *Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975); *Draper* v. *U. S. Pipe & Foundry, supra.*

If futuristic and speculative predictions amount to "undue hardship" under Section 701(j), then the law enacted by Congress has no real meaning or effect.

II. The 1972 "Religious Accommodation" Amendment and EEOC's 1967 Guideline Do Not Violate the Establishment Clause of the First Amendment.

As will be developed, it is obvious that the "religious accommodation" provisions of Title VII do not violate the Establishment Clause of the First Amendment but rather fulfill a valid congressional goal—the elimination of discrimination in employment based on an individual's religion.

The purpose of the 1972 amendment was clarification by Congress that a person's religious beliefs and practices should not be a factor in the area of employment.

The amendment is far from rigid; rather, it takes into consideration the individual circumstances of each case and thereby is a proper balance between the rights and duties of the employer to function in the business world without discriminating and the rights and duties of an employee to freely exercise his religion and be able to compete equally in the job market.

The "accommodation" provision is the very heart of the ban on religious discrimination.

Petitioners have not challenged Title VII's basic prohibition against religious discrimination in employment by private employers. This is a proper exercise of con-

gressional power under the Commerce Clause[8] and cannot be considered a "law respecting an establishment of religion."

A. The background of Section 701(j) of the Civil Rights Act.

Congress focused its primary attention on the problem of racial discrimination when it considered Title VII of the 1964 Civil Rights Act. There is scant legislative history concerning the inclusion of religious discrimination in the prescribed employment practices, and what can be found is not very illuminating.

It should be clear, however, that Congress included religion as a proscribed factor because its inclusion reflects a recognition that the exercise of religious freedom in the United States has always been considered a fundamental right which lies at the heart of a free society.[9]

In 1966 the United States Equal Employment Opportunity Commission issued guidelines which were intended to give meaning and substance to the proscription of religious discrimination contained in Section 703(a)(1) of Title VII.[10] After a year's experience with those guidelines, the EEOC issued new guidelines on July 10, 1967, which included the obligation on the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be

8. 110 Cong. Rec. 1528, 7207-7212. *Cf. Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964).

9. And it has been included in most state fair employment procedure laws. Edwards & Kaplan, "Religious Discrimination and the Role of Arbitration Under Title VII," 69 Mich. L. Rev. 599, 602 (1971).

10. 31 Fed. Reg. 8370 (1966).

made without an undue hardship on the conduct of the employer's business.[11]

These guidelines were extensively discussed in *Dewey* v. *Reynolds Metals Co.* The District Court ruled in favor of Dewey.[12] The Court of Appeals for the Sixth Circuit reversed, holding *inter alia*, that Title VII did not ban facially neutral employment practices which had the effect of terminating Dewey's employment because of his religious beliefs and practices.[13] The Supreme Court affirmed that decision by an equally divided vote.[14]

Thus, the validity of the 1967 guidelines was questionable in 1972. Further, this Court had decided *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), in which it was stated:

> "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. . . . But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U.S. 431-432.

From 1971 to the present there have been two possible interpretations of the meaning of religious discrimination under Title VII. First, Title VII prohibits any employer action or rule that is otherwise neutral on its face, such as

11. 29 C.F.R. §1605.1.

12. 291 F.Supp. 786 (W.D.Mich. 1968); 300 F.Supp. 709 (W.D.Mich. 1969).

13. 429 F.2d 324 (6th Cir. 1970).

14. 402 U.S. 689 (1971).

a requirement that all workers must work on Saturday, if the action is not uniform in its impact on employees holding differing religious beliefs, unless the employer can prove "business necessity".[15] Second, Title VII prohibits a neutral-on-its-face employment practice which has a discriminatory impact on employees holding differing religious beliefs, but allows for exculpation (1) if the employer has made a reasonable effort to accommodate the religious needs of the employee, or (2) if an accommodation cannot be made without undue hardship to the employer.

In response to the uncertainty created by the *Dewey* decisions Congress enacted Section 701(j) in 1972. Senator Jennings Randolph, the sponsor, added this new section to show that Congress did intend to require the employers to attempt a reasonable accommodation required by the 1967 guideline. By requiring a "reasonable accommodation" test rather than a "business necessity" test, the burden on employers was lessened. Clearly, requiring employers to reasonably accommodate religious needs, unless the accommodation places undue hardship on the conduct of the employer's business, is a less onerous and burdensome standard than requiring an employer to demonstrate that a policy or practice is dictated by business necessity.

B. The religious accommodation provision renders "religion" a neutral factor in employment.

There are basically two levels of discrimination. The first level is the blanket rejection of a job seeker because of that person's race, color, *religion* or national origin.

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15. This burden is much greater than that of reasonable accommodation. See *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971); *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2nd Cir. 1971). "Necessity connotes an irresistible demand."

The company does not contend, nor do the commentators,[16] that Congress did not have the authority to outlaw discrimination on this level.

Their chief contention is that Congress exceeded its Constitutional authority by outlawing discrimination on the second level—the practice of one's religion, when they enacted the reasonable accommodation provision.

Religiously based activities are protected by the First Amendment and in this context of private employment they are protected by Congress. *Wisconsin* v. *Yoder*, 406 U.S. 205 (1975); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943).

The Courts have consistently removed artificial barriers that resulted in discrimination because of race or sex.[17] Congress, in enacting 701(j) removed an artificial barrier that discriminated because of religion.

The creation of the accommodation provision is totally consistent with the *Griggs* doctrine.

However, Congress has relieved the employer of the heavy burden of *Griggs* in religion cases. They have not written an absolute. They have instead created a balancing factor. The wishes of the employee are not always followed.[18]

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16. Edwards & Kaplan, *supra*: "Civil Rights—Religious Discrimination in Employment," 54 Tex. L. Rev. 616 (1976); "Is Title VII's Reasonable Accommodation Requirement a Law Respecting an Establishment of Religion," 51 Notre Dame L. Rev. 481 (1976).

17. *Phillips* v. *Martin Marietta*, 400 U.S. 542 (1971); *Griggs*, *supra*.

18. e.g. *Williams* v. *Southern Union Gas Co.*, 529 F.2d 483 (10th Cir. 1976) cert. denied, 45 LW 3363 (1976); *Reid* v. *Memphis Publishing Co.*, 521 F.2d 512 (6th Cir. 1975) cert. denied, 45 LW 3364; *United States* v. *City of Albuquerque*, 9 E.P.D. ¶10,182 (C.D. Cal. 1975).

C. The 1972 Amendment and 1967 Guideline meet this court's threefold Establishment Clause test.

Petitioner contends that this statute somehow benefits churches. That benefit, if there is one, is incidental and *de minimis*.[19] It is not the type prohibited by the First Amendment.

> It is sufficient to note that for the men who wrote the Religion Clause of the First Amendment the 'establishment of a religion connoted a sponsorship, financial support, and active involvement of the sovereign in religious activities. *Walz* v. *Tax Commission*, 397 U.S. 664, 701 (1970). See also *Engel* v. *Vitale*, 370 U.S. 421 (1962).

There may always be an incidental benefit to religion when Congress or the state acts in this area.[20] "It cannot be ignored that the First Amendment itself contains a religious classification." *Welsh* v. *United States*, 398 U.S. 333, 372 (1970) (White, J. dissenting).

This Court has not held, and the First Amendment "does not say that in every and all aspects there shall be a separation of Church and State." *Zorach* v. *Clauson*, 343 U.S. 306, 312 (1952).

Congress, by passing the 1972 Amendment, wanted to eliminate discrimination based on religion.

As stated by Mr. Justice Douglas in *Zorach*:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the

19. In fact this statute has been ruled to apply where there is no church or no religion. *Young* v. *Southwestern Savings and Loan Association*, 509 F.2d 140 (5th Cir. 1975).

20. E.g. *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Everson* v. *Board of Education*, 330 U.S. 1 (1947); *Board of Education* v. *Allen*, 392 U.S. 236 (1968).

> schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. 343 U.S. at 314.

I. PURPOSE

This Court has just recently restated this threefold test in *Roemer* v. *Board of Public Works of Maryland*, ... U.S. ....., 44 L.W. 4939 (1976), quoting *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971):

> First, the statute must have a secular legislative purpose: second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive government entanglement with religion.'

Accord: *Meek* v. *Pittenger*, 421 U.S. 349, 358 (1975); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 772 (1973); *Tilton* v. *Richardson*, 403 U.S. 672, 678 (1971).

This Court has never found any statute enacted by Congress to be lacking a substantial secular purpose, although twice has it made such a finding in a challenge to a state statute. The claim of illegitimacy of purpose has been made often, but, with the two exceptions, it has been consistently rejected. *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582 (1961); *Gallagher* v. *Crown Kosher Market*, 366 U.S. 617 (1961)—(Sunday closing laws); *Tilton* v. *Richardson*, 403 U.S. 672 (1971)—(inclusion of

church-related colleges under the Higher Education Facilities Act of 1963); *Board of Education* v. *Allen*, 392 U.S. 236 (1968); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973); *Sloan* v. *Lemon*, 413 U.S. 825 (1973)—(aid to parochial schools); *Hunt* v. *McNair*, 413 U.S. 734 (1973)—(aid to church-related colleges); *Walz* v. *Tax Commission of the City of New York*, 397 U.S. 664 (1970)—(tax exemption for houses of worship).

The two exceptions are *Abington School District* v. *Schempp*, 374 U.S. 203 (1963)—(law requiring Bible reading in public schools); and *Epperson* v. *Arkansas*, 393 U.S. 97 (1968)—(law banning teaching of evolution in public schools). These cases involved a direct religious purpose—the fostering of a particular religious belief. Such is not the case presently before this Court.

The purpose of the "religious accommodation" amendment is to insure that a person is not discriminated against because of the practice of his religion. The purpose behind Title VII was to remove artificial barriers and to open the job market to persons regardless of their religion, race, color, national origin or creed.

The protection by Title VII applies to Sabbatarians differently than other protected groups. They need to be protected in their right to freely exercise their beliefs, if—and only if—that exercise does not cause an undue hardship on their employer.

"The freedom to believe and to practice strange and, it may be foreign creeds, has classically been one of the highest values of our society." *Braunfield* v. *Brown*, 366 U.S. 599 (1961) (Brennan, J., dissenting); also *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Jones* v. *Opelika*, 319 U.S. 103 (1943); *Martin* v. *Struthers*, 319 U.S. 141 (1943); *Follett* v. *McCormick*, 321 U.S. 573 (1944).

"Neutrality is what is required. The State must confine itself to secular objectives, and neither advance nor *impede* religious activity." *Roemer*, *supra*, 44 L.W. at 4943. (Emphasis supplied).

That is what was intended by Congress—the elimination of the situation where an employee was forced to abandon "one of the precepts of" his "religion in order to accept work. . . ." *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963).

The right to employment is extremely important in our society. This Court recognized the value of that right many years ago in *Truax* v. *Raich*, 239 U.S. 33, 41 (1915).

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to service.

If men and women are to be terminated from employment because their religious beliefs do not allow them to work on Saturdays, then a substantial minority segment of the nation's work force will be denied the opportunity to compete as equal job competitors with those individuals who subscribe to majoritarian religious beliefs and practices. Unless some effort is made to accommodate these religious practices, there will be discrimination on the basis of religion which Section 703(a) of Title VII was enacted to prevent.

Unquestionably, by attacking the evil of discrimination because of religion in employment, Congress has acted to facilitate the free exercise of religion.

The burden, if it is a burden, on employers to cease discriminating on the basis of religion was placed on them

by enactment of Section 703(a) of Title VII effective July 2, 1965, and was not safely placed there by any EEOC guideline or the enactment of Section 701(j), effective March 24, 1972. The amendment did not change existing law but rather codified a number of Federal Court decisions.

Any reliance placed on the "Sunday closing" cases is misplaced. Chief Justice Warren noted in *Braunfield* v. *Brown*, 366 U.S. 599, 608 (1961), that a number of states provide by statute for an exemption of Sabbatarians "and that may well be the wisest solution to the problem." This is exactly what Congress has done in this instance.

II. EFFECT

The primary effect of the 1972 amendment and the 1967 guideline is *not to advance* religion, as claimed by petitioners, but rather *to protect*, among other things, the religious freedom of those who observe a day other than Sunday, as their holy day of rest.

The Constitutional ban addresses itself to statutes that "tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent." *Abington School District* v. *Schempp*, 374 U.S. 203, 236 (Brennan, J. concurring).

There is no effect on religion in the present case. *McCollum* v. *Board of Education*, 333 U.S. 202 (1948); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968). The effect that is forbidden is *primary*. Thus the Prohibition Act contained an exemption for the use of sacramental wine (41 Stat. 308), which was upheld in *People* v. *Marquis*, 291 Ill. 121, 125 N.E. 757 (1919). And as this Court noted in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), Congress has exempted the Amish from the payment of social security

taxes, 26 U.S.C. §1402(h). Persons with religious objections to abortions are protected from dismissal, 42 U.S.C. §300(a)(7).

And it is clear that, "not every law that confers an 'indirect', 'remote' or incidental benefit upon religious institutions is, for that reason alone, constitutionally invalid," *Nyquist, supra*, 413 U.S. at 771; *Roemer, supra; Tilton, supra; Walz, supra.*

There is no "sponsorship, financial support and active involvement of the sovereign in religious activity." *Walz, supra*, 397 U.S. at 668.

Government is neither theocratic nor antagonistic to religion. It must remain neutral. But the First Amendment does not forbid it from taking cognizance of the nature of the people.

> For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion to those who do believe. *Zorach, supra*, 343 U.S. at 313-314.

The effect of the accommodation on religious institutions, if there is one, is so remote as to be *de minimis*. The primary benefit (freedom from employment discrimination), accrues to *individuals* and not any religious institution. This type of "aid" has been upheld repeatedly. E.g. *Everson* v. *Board of Education*, 330 U.S. 1 (1947)—(school bus transportation for parochial students); *Board of Education* v. *Allen*, 392 U.S. 236 (1968)—(textbooks

for parochial students). This Court recently reaffirmed these holdings in *Roemer* v. *Board of Public Works, supra*:

> *Everson* and *Allen* put to rest any argument that the State may never act in such a way that has the incidental effect of facilitating religious activity. 44 L.W. at 4942.

Nor is the effect of Section 701(j) unconstitutional on the ground that certain religions are more favored than others. *All* aspects of religious observance and practice are covered by the law, and *all* religions are treated equally.[21] The fact that some religions may have more or different kinds of religiously-dictated observances than others does not invalidate a law that applies equally to all.

This primary effect of ending religious discrimination in employment is simply to ensure that each individual employee will be, to the greatest extent possible, treated identically with every other employee. It ensures that one's religion does not function to penalize his employment opportunities. Title VII attacks discrimination rather than fosters religion.

Since our society generally observes the Sabbath on Sunday, *McGowan, supra,* Congress would have been perpetuating an inequity and failing in their duty to protect religious freedom of Saturday Sabbatarians by not enacting 701(j):

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious

21. Including non-religions. "Congress, through Title VII, has provided the Courts with a means to preserve religious diversity from forced religious conformity," *Young* v. *Southwestern Savings & Loan Assn.*, 509 F.2d 140, 141 (5th Cir. 1975). An atheist could not be compelled to attend a devotional service.

> minorities to conform to the prevailing officially approved religion is plain. *Engel* v. *Vitale,* 370 U.S. 421, 431 (1961).

Petitioners seem to ignore this Court's pronouncement in *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), that a *particular* religious sect, the Amish, were exempt from a state compulsory education law. There the statute applied to all, as does Section 701(j). However, in *Yoder* it was said:

> A regulation neutral on its face may, in its application nonetheless offend the constitutional requirements for governmental neutrality if it unduly burdens the free exercise of religion. 406 U.S. at 220.

If Hardison had been employed by a governmental agency then he would have been protected by the Constitution. *Sherbert, supra.* What Congress did with the enactment of Title VII was to apply this Constitutional standard to private employees.

This is certainly nothing new and has been done to outlaw race discrimination in the private sector. *Runyan* v. *McCrary,* ..... U.S. ....., 44 L.W. 5034 (1976); *Jones* v. *Mayer,* 392 U.S. 409 (1968); and *Tillman* v. *Wheaton-Haven Recreation Assn.,* 410 U.S. 431 (1973).

Since the effect applies to individuals, 701(j) does not violate the First Amendment.

> The answer, I believe, lies in the experienced judgment of various members of this Court over the years that the balance between the policies of free exercise and establishment of religion tips in favor of the former when the legislation moves away from direct aid to religious institutions and takes on the character of general aid to individual families. *Committee for*

Public Education and Religious Liberty v. *Nyquist*, *supra*, 413 U.S. at 82.

III. ENTANGLEMENT

This Court has dealt with several types of cases involving "excessive entanglement" of government in religion.

Some of these relate to monitoring or auditing financial aid. *Roemer, supra; Tilton, supra; Hunt, supra.*

Others relate to sincerity of belief. As was stated at *Welsh* v. *United States*, 398 U.S. 333, 370 (1970), White, J. dissenting:

> The Court could as Congress has done exempt religious objectors to wars. And such an exemption would be no more an establishment of religion than the exemption required for Sabbatarians in *Sherbert* v. *Verner*. *See also Gillette* v. *United States*, 401 U.S. 437 (1971).

And of course, *Walz, supra,* where the government is required to intimately analyze a religious organization to determine its eligibility for tax-exempt status.

There is no excessive entanglement in the present case.

In *Cummins* v. *Parker Seal Co.*, 516 F.2d 544, 553-554 (6th Cir. 1975), the Sixth Circuit said:

> For the most part, the EEOC and the courts will have to determine simply whether the employer has made a reasonable accommodation and whether an undue hardship will result. These issues will be considered in the labor relations context, and their resolution certainly does not necessitate any government entanglement with religion.

The question of sincerity is not an issue here. It seldom is.[22]

However, the determination of sincerity initially is made by the Company, not a governmental agency. The role of the EEOC and the Courts is to determine compliance with the statute.

Since religious discrimination was outlawed under 703(a), obviously it makes a difference what a person's religious tenets are.

Any involvement the government has in Title VII religion cases is peripheral and mandated by the Congressional desire to outlaw religious discrimination in employment. What little entanglement there is is for a secular purpose—to ensure compliance with the law. General supervision has never been forbidden. (See *Zorach, supra; Roemer, supra.*)

Petitioner talks of the "wall" between church and state being breached.[23] However, there is no wall. There is a "blurred, indistinct and valuable barrier depending on all the circumstances of a particular relationship." *Lemon* v. *Kurtzman, supra,* 403 U.S. at 614.

It is blurred because each case stands alone. Congress has extended the Constitutional right to practice one's religion to the private sector. This is no more unconstitutional than to exempt Sabbatarians from Sunday closing laws. *Braunfield* v. *Brown,* 366 U.S. 599, 614 (1961), Brennan, J. dissenting.

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22. *Cummins, supra; Draper* v. *U. S. Pipe & Foundry Co.*, 527 F.2d 515 (6th Cir. 1975); *Young, supra.*

23. *Cummins, supra,* dissenting opinion.

The freedom to practice one's religion is not absolute, *Reynolds* v. *United States,* 98 U.S. 187 (1878); *Prince* v. *Massachusetts,* 321 U.S. 158 (1944); nor should it be so.

Some entanglement is always required. Were *any* entanglement fatal, then no law could grant tax exemptions to churches, or any laws posed forbidding liquor stores or adult book stores to be located near a church.

Government should not take a hostile attitude toward religion because there are "unavoidable accommodations necessary to achieve the maximum enjoyment of each and all of them. . . ." *Abington School District, supra,* 374 U.S. at 306, Goldberg, J. concurring.

Congress has not written an absolute. An employer is not always required to accommodate whatever religious beliefs his employees have.

An individual's religious beliefs and practices must give way, if he wishes to remain employed, if an employer can demonstrate that these practices are unreasonable or that the practice places an undue hardship on the employer.

Section 701(j) is a practical statute designed to allow for the religious diversity for which our forefathers fought, while at the same time allowing employees to compete in the business world.

In the present case Hardison was denied that right because he abided by the tenets of his religion.

The primary purpose of Section 701(j) was to protect Hardison's job against treatment like he was subjected to by TWA. The effect of §701(j) was to allow employers to adjust their work schedules and rules, when necessary, to embrace all persons of all religious beliefs into their employment and to be considered by their personnel policies.

The only excessive entanglement involved in this case, was the personal efforts which Hardison attempted in accommodating his employer and these efforts were participated in through non-governmental procedures.

Let us not be myopic—there is not a violation of the Establishment Clause in this case. The only incidental benefit present in this case, by compliance with §701(j) and the preceding Equal Employment Opportunity Commission guideline is one that fosters consideration for the schedules of working men with sincere beliefs about their religions, and not any religions to which they may or may not belong.

CONCLUSION

For the foregoing reasons, Larry G. Hardison submits that the decision of the United States Court of Appeals for the Eighth Circuit should be affirmed in all respects.

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Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1126

TRANS WORLD AIRLINES, INC.,
Petitioner,

vs.

LARRY G. HARDISON, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER TRANS WORLD AIRLINES, INC.

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER TRANS WORLD AIRLINES, INC.

SUMMARY OF REPLY ARGUMENT

Hardison does not answer TWA's Rule 52(a) argument, rather he asserts that TWA made no effort to accommodate. The district court findings, which are amply supported by the record, destroy Hardison's assertion. TWA accommodated Hardison's special religious holidays, it held several meetings to seek means of accommodation, it affirmatively sought union help in the accommodation

process, it agreed to waive the seniority provisions of the collective bargaining agreement and authorized the union to seek a job swap. TWA would not have been placed in the position of not being able to accommodate if Hardison had not voluntarily transferred for secular reasons from a shift where he had sufficient seniority to observe his Sabbath to a shift where he knew he would have to work on his Sabbath. Under the circumstances of this case, TWA had no duty to violate, without union consent, the bona fide and nondiscriminatory seniority rights of other employees. To render any further accommodation, TWA not only would have dispossessed other employees of their seniority rights but also would have incurred extra overtime expense (if overtime would be required because of the contractual duty to work reduced forces on weekends) or deprive other areas of work coverage. Hardison was the only person scheduled in his important job on Saturdays and the job had to be filled 24 hours a day every day of the year to respond to emergencies. Given the foregoing findings that are firmly supported in the record, the court of appeals de novo trial must be reversed.

The core constitutional issue is not Hardison's freedom of religion but rather whether the accommodation scheme violates the Establishment Clause because private employers are compelled by government direction to accommodate an employee's religious beliefs by incurring extra expense or by infringing upon the rights of other employees. Hardison is receiving preferential employment rights solely because of his religion. No other employee can receive a comparable secular benefit for nonreligious purposes. Other religious employees may or may not receive comparable preferences. Religion is fostered and some sects are preferred over others. Religious strife is apt to result from application of the accommodation scheme and none

of the virtues of voluntarism, neutrality or mutual abstention are protected. Nor does the accommodation requirement pass muster under the three part test of *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973). First, the sectarian purpose of the law is evident on its face and in its legislative history. Second, contrary to Hardison's assertion, even if the law has a valid purpose, the primary effect is to substantially aid religion and religious activities. The scheme does not escape its constitutional infirmities by the granting of aid to individuals. The effect of advancing religious activities is more pervasively sectarian than the proscribed indirect aid in *Nyquist, supra*. The Establishment Clause forbids aid to religion regardless of whether the law supposedly extends benefits equally to all religions and all religious beliefs. Third, the government is extensively entangled in continuous investigation, supervision, conciliation and controversy in respect to the determination of reasonable accommodation and undue hardship. The involvement is pregnant with the potential for ever expanding surveillance entanglements. The accommodation scheme violates the Establishment Clause.

REPLY FACTUAL STATEMENT

Neither Hardison nor any of the amici (the "amici" referred to herein are those in opposition to Petitioner), present a fair or balanced statement of facts. They endeavor to create the impression, by innuendo, that TWA and the unions harbored ill feelings toward Hardison or his religion (and all other minority religions) and, therefore, through some unspecified sinister "joint action" successfully discriminated against Hardison. (See, for example, Seven-Day Br., p. 52 and World-Wide Br., p. 17).

They also ignored the district court's findings regarding TWA efforts to accommodate.[1]

The evidentiary hearing before Judge Oliver consumed three full days in which the testimony of seven live witnesses was presented. If there was one scintilla of evidence demonstrating any discriminatory conduct or intent by TWA or the unions, Judge Oliver would have so found. (See, for example, the colloquies between Judge Oliver and the trial counsel at R. 86-100, 109-116 and 118-128). To the contrary, after reviewing the parties' stipulations, documentary evidence and hearing the live testimony, Judge Oliver observed that he was, ". . . impressed with the men who were on the line handling the problem." (R. 474).[2]

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1. While the amici's viewpoint could be expected because of their efforts to gain and keep special benefits for their religions, Hardison's failure to present a full factual statement is surprising in view of his acceptance of TWA's essentially identical factual statement in the petition for certiorari (Resp. Br. in Opp. to Cert., p. 4).

At the outset, TWA respectfully submits that the amici briefs contain erroneous factual assertions, overstated arguments and are significantly void of any rational consideration of the relationship between employers, employees, unions and union members. They continually ignore the impact the union presence has upon TWA. The amici urge short-sighted positions in respect of the proper relationship not only of Church and State but also the proper position of religion in the secular relationships of individuals.

2. Judge Oliver documented his findings by appropriate references to the trial transcript (A. 183-209). Notwithstanding Judge Oliver's diligent trial efforts and his documented findings, it is somehow divined that TWA and the unions were opposed to Hardison's religion. Page 12 of COLPA's brief and page 17 of World-Wide's brief typify such mistaken assertions. Ignored is the stipulated fact that no one threatened, maligned or impugned Hardison or his religion (A. 41). Indeed, Hardison twice wrote Kussman thanking him for his understanding and cooperation (A. 29 and 31). Similarly, Kussman wrote Hardison on October 11, 1968 and stated ". . . I wish you every success and happiness in your relationship with the church" (A. 30). TWA accommodated Hardison's special religious days (A. 238-240).

(Footnote continued on following page)

Hardison and the amici ignore TWA's business requirement that Hardison's job had to be filled 24 hours a day, 365 days a year because of the need to respond to emergencies (A. 125, 142, 149-150). One amicus attempted to factually argue that TWA made no proof of what happened on occasions when Hardison was absent (Seven-Day Br., p. 64). That "non-fact" is a red herring that misses the point that no one knows when an emergency will occur. The ignored evidence was that TWA naturally filled the job in Hardison's absence and that extra costs were incurred and some other employee or job function suffered as a result (A. 162).

Hardison's counsel stipulated that the seniority provisions required his dismissal (A. 76). Moreover Hardison could not remember whether he indicated any willingness to work four days a week (A. 83).

Hardison and the amici ignore the fact that TWA must rely upon the union steward to fill all jobs. The steward maintains the seniority list and he refers to the list to enforce seniority when necessary (A. 106, 127, 138-140 and 158). Judge Oliver recognized this as the normal procedure (A. 208). Yet, neither Hardison, the court of appeals, nor any of the amici demonstrated any cognizance or appreciation of the sound reasons why both management and unions do not want the employer placed in the position of appearing to coerce "volunteers". Similarly, Hardison, the amici and court of appeals ignore TWA's contractual obligation to work a minimal work force on

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Footnote Continued—

Kussman also testified that he ". . . respected the man's religious convictions" (A. 135). Hardison's suggested findings of fact made no contention of any intentional discrimination (Tr. A. 82-112). There simply was no intent to discriminate (A. 159) and it is now entirely too late to manufacture, even by innuendo, such a baseless charge.

the weekends and the general preference of high seniority employees not to work on weekends (A. 104, 120, 134, 135 and 216).[3]

Hardison erroneously asserts that TWA made no attempt to accommodate or to look for volunteers (Resp. Br., p. 20). No such assertion was made in his proposed findings of fact (Tr. A. 82-112). He now refers to page 261 of the appendix to support his position (Resp. Br., p. 20). Yet, that reference is not to the evidence but to the court of appeals' opinion which, in sharp contrast to Judge Oliver's findings, was not accompanied by any supportive record reference. TWA did authorize the union to search for swaps. For example, in May, 1968, the report was that it was understood that Hardison's day off requirements were "too difficult to handle . . . no one would swap . . ." (A. 28). Hardison and the amici also ignored the fact that TWA initiated meetings to seek accommodation. TWA also arranged for the union's presence at the meetings (A. 69-72). TWA agreed to waive seniority restrictions but the union refused to do so (A. 204, 207-209).

A closely related factual error is the assertion by one amicus (without record reference) that the collective bargaining agreement permitted a "volunteer" to fill Hardison's job (Seven-Day Br., p. 62). That factual assertion is totally erroneous. Hardison knew and understood that, under the applicable collective bargaining agreement, all jobs, openings or overtime had to be subject to bidding (Resp. Br., p. 17). It was each individual employee's right to accept or reject jobs according to the seniority list (A.

3. Hardison was acquainted with the problems of employers and employees respecting holidays and weekend work schedules because a prior employer had terminated him after he complained about holiday work schedules (Tr. App. 37). Those complaints by Hardison were made prior to his joining the World Wide Church of God.

214). Thus, neither the union nor TWA could indiscriminately seek a "volunteer". The union steward filled jobs by reference to the seniority list and if there were no takers, then seniority would be forced in reverse order. If a volunteer was found by TWA without union consent, every other senior employee would have a grievance for overtime pay. Further, Hardison and the amici ignore the fact that there were no situations where seniority was not followed as a matter of practice, even on holidays (A. 138-140).

Hardison (Resp. Br., p. 5) and one amicus (Seven-Day Br., pp. 7 and 61) misstate the record in asserting the unsubstantiated conclusion that some unknown employee on the graveyard shift "was willing" to swap. Both briefs fail to point out that Hardison later testified regarding whether the other employee was actually willing to swap, ". . . *I don't know*" (Hardison Dep. 90, emphasis added).

Hardison's factual statement fails to refer to his testimony that the obligations for members of the World-Wide Church of God are the same as those for non-members studying to become members (Hardison Dep. p. 25). Thus, it remains unexplained how Hardison could consistently write Kussman on April 25, 1968 that he could no longer work from Friday sunset to Saturday evening because, ". . . I *sincerely believe* this is the Sabbath and no servile work may be done then" (A. 28, emphasis added) and thereafter volunteer for premium paying overtime work (A. 73-74, 79-84, 100-101). While no one disputes the fact that Hardison was a member of the World Wide Church of God, the depth and sincerity of beliefs is an issue relevant to accommodation.

Hardison attempts to distort Kussman's agreement to grant Hardison a day off on each of his special religious holidays (Resp. Br., p. 3). He ignores Judge Oliver's spe-

cific finding that Kussman had agreed to do so (A. 203). Hardison also testified that he had no doubt that Kussman would have granted an excused absence for such holidays (Hardison Dep., p. 37).

Hardison's statement of facts also fails to acknowledge that when he made his December, 1968 voluntary shift transfer he knew he was giving up relatively high seniority and that he could reasonably expect some Saturday work in his new position (Resp. Br., pp. 3-4 and A. 104, 105).[4]

Hardison omits any reference as to why TWA and the unions felt obliged to take the respective positions each did in the accommodation process (Resp. Br., p. 5). Thus, Hardison fails to point out that while he had only himself to consider, TWA had to consider its other employees, its job requirements, its work scheduling problems and its relationship with the union. The union likewise had to consider the contractual rights of other parties and the overall administration of the collective bargaining agreement.[5]

Hardison and the amici take the position that the union's actions are no longer at issue. Nevertheless, a fair and balanced statement of facts should acknowledge

4. While Hardison now says that he was willing to do "anything", he should have given more serious thought to the probable and likely consequences of his December, 1968 voluntary transfer. Far from being intentionally deprived of his "livelihood" (World-Wide Br., p. 4), Hardison knowingly jeopardized his sabbath observances solely to satisfy a secular desire. It should also be noted that Hardison found other employment and was not destitute (Tr. A. 37).

5. Hardison's reference to his request for excused absences again does not fully explain what occurred (Resp. Br., p. 5). Hardison, in fact was evasive in his contacts with the supervisors and, likewise, Hardison failed to mention that despite advice from his wife, father-in-law and union he refused to cooperate in the filing of a grievance or in pursuing an appeal from his termination (A. 42, 175-176, 178-182, 231-232).

TWA's efforts to resolve the matter with the union. TWA's liability cannot be decided in a factual vacuum. An employer, and in particular supervisory personnel like Mr. Kussman who must work with a union every day, simply cannot ignore a union's specific refusal to vary bona fide collective bargaining provisions. That is particularly apt when the evidence reveals the high importance placed upon seniority by TWA's employees and that a great many of TWA's overhaul base grievances already related to seniority (A. 163). Such facts coupled with the real fear of additional grievances and morale problems place TWA's refusal to breach the collective bargaining agreement, without union consent, in a proper perspective.[6] Similarly, the amici are wrong in saying that only the employer possesses the "information" to effectively make an accommodation (COLPA Br., p. 25 and Seven-Day Br., p. 49). Here, as noted above, it was the union that possessed and controlled the employee scheduling information such as seniority lists (A. 106, 127, 138-140 and 158).

Finally, neither Hardison nor any of the amici acknowledge that none of the hypothetical "alternatives" found by the court of appeals were suggested at the time of the events, claimed at trial or even proposed as suggested findings of fact by Hardison (Tr. A. 82-112). Hardison's own answers to interrogatories demonstrate that his claim was based solely upon whether the seniority provisions had to be breached in the circumstances of this case (Tr. A. 24-26 and 35).

6. There is no evidence of any prearranged joint conduct or agreement by the unions and TWA to "whipsaw" or "one-two punch" Hardison (COLPA Br., pp. 33 and 34). If anyone was caught between a "Scylla and Charybdis" it was TWA. The employee knowingly jeopardized his ability to practice his religion. The union that TWA must live with every day refused to waive the seniority provisions of a collective bargaining agreement (A. 188). TWA also faced the contractual limitation of reduced weekend work forces, the fear of not getting overtime help, increased costs and the lack of work coverage.

REPLY ARGUMENT

I. TWA's Rule 52(a) Argument Was Not Answered And In The Circumstances Of This Case It Must Be Concluded That TWA Made Reasonable Efforts To Accommodate Without Undue Hardship.

Hardison has not responded to TWA's Rule 52(a) argument, rather he argues that there was, ". . . no attempt on the part of the Company to reasonably accommodate. . ." (Resp. Br., 17). Judge Oliver's express factual findings destroy Hardison's argument. Moreover, the court of appeals' substitution of its view of the facts cannot be squared with Rule 52(a).[7]

Matters of "reasonable accommodation" and "undue hardship" are questions of fact for the district court's determination. *United States* v. *City of Albuquerque,* 9 E.P.D. ¶10,182 (D. N. Mex. 1975), *aff'd,* 545 F.2d 110 (10th Cir. 1976); *Williams* v. *Southern Union Gas Co.,* 529 F.2d 483 (10th Cir. 1976), *cert. denied,* November 15, 1976, No. 75-1511 and *Johnson* v. *United States Postal Service,* 497 F.2d 128 (5th Cir. 1974). A review of the record and rele-

7. The court of appeals refused to follow the rule that in determining whether there is a sufficient evidentiary basis for district court findings of fact, the court of appeals must take the facts and inferences therefrom which are the most favorable to the prevailing party below. *Aunt Mid, Inc.* v. *Fjell Oranje Lines, Inc.,* 458 F.2d 712 (7th Cir. 1972).

The district court, as contrasted to the court of appeals, extensively reviewed existing case law. Its conclusions on those cases were not attacked by Hardison or the court of appeals. One amicus, however, attempts to circumvent TWA's argument by asserting that the court of appeals was deciding questions of law (Seven-Day Br., p. 51). That assertion is wrong. The court of appeals did not disagree on the law but rather squarely stated that the issue before it was whether the district court's findings were clearly erroneous (A. 251). The court of appeals just disagreed with the district court and in its *de novo* review, it substituted its view on the facts.

vant factors heretofore deemed important in various court decisions demonstrates that the district court's findings are correct and amply supported.

The Presence of a Nondiscriminatory Collective Bargaining Agreement. The applicability of a bona fide nondiscriminatory collective bargaining agreement must be given due consideration. See *Dawson* v. *Mizell,* 325 F. Supp. 511 (E. D. Va. 1971); *Yott* v. *North American Rockwell Corp.,* 501 F.2d 398 (9th Cir. 1974); and *Cooper* v. *General Dynamics, Convair Aerospace Div.,* 533 F.2d 163 (5th Cir. 1976), *rev'g,* 378 F. Supp. 1258 (D. C. Tex. 1974).

The district court found that ". . . under the circumstances" of this case, there was no duty to breach the collective bargaining agreement (A. 192 and 208). The seniority provision was neutral, evenhandedly applied, and was negotiated on a nondiscriminatory basis (A. 192). Further, the union met its duty of fair representation (A. 228). Thus, because part of TWA's business includes its relationship with unions and the management of its employees (who regard seniority as an important right), there should be no duty to violate the union's express directive that seniority could not be waived (A. 244). The impact of the evenhanded rule is truly "incidental" regarding any religious discrimination (A. 227). The seniority rights protected by the union were legitimately earned and were entitled to protection. Section 703(h)'s plain language saves such bona fide rights. There is no intentional past discrimination to remedy. Nor is there any joint effort by the employer and union to affirmatively deny employment rights.[8]

8. Upon the remand ordered in *Yott, supra,* the district court (Judge M. Real) on January 10, 1977 declared the accommodation guideline and statute unconstitutional under the Establishment Clause. Judge Real went on to find that, in any

(Footnote continued on following page)

At the very least, the impact of a bona fide collective bargaining agreement is a question of fact for the trier of fact. *Yott, supra* and *Cooper, supra*. The court of appeals' finding, or more aptly nondecision, on the seniority issue is based upon a contorted and misconceived view of the record. There was no doubt in the minds of the parties that in order for TWA to provide further accommodation it had to violate, without union consent, the collective bargaining agreement (Tr. A. 35-37). Hardison's interrogatory answers conceded that his claim was based upon failure to breach the agreement (Tr. A. 24-26 and 35). Moreover, the so-called "alternatives" of the court of appeals were fabricated from hindsight. Hardison did not rely upon or list such hypothetical "alternatives" at the trial or in his proposed findings of fact (Tr. A. 82-112). In fact, Hardison still realizes that the only way TWA could have provided further accommodation was to incur the union's wrath by breaching seniority. Hardison's brief devotes some 12 pages in support of his claim that TWA or the unions had to violate valid seniority rights of others but only some 2 or 3 paragraphs in support of the "alternatives" (Resp. Br., pp. 20-21). In any event, each alternative would require a breach of the collective bargaining agreement or the imposition of costs and grievance problems for TWA (TWA's Br., pp. 53-57).

Footnote Continued—

event, it would have been an undue hardship to permit Yott to refrain from payment of union dues. Judge Real also points out that accommodation is not a one-way street but a process which requires much cooperation by the employee. *Yott* v. *North American Rockwell*, 14 F.E.P. 447 (C. D. Cal. 1977). See also the February 17, 1977 decision in *Anderson* v. *General Dynamics*, 14 F.E.P. 667 (S. D. Cal. 1977). Judge Denney also found that nonpayment of union dues was an undue hardship. There is no difference in principle between seniority rights and the requirement of union dues. Moreover, it would be anomalous for an employer who agreed to waive the pertinent collective bargaining provisions to be held liable when the union that refused to do so escapes liability.

Morale, Grievance and Union Relations Problems. The district court also properly considered the morale and grievance problems that would be created by any further accommodation (A. 207-209). Hardison, the amici and the court of appeals would ignore cases such as *City of Albuquerque, supra; Reid* v. *Memphis Publishing Co.*, 521 F.2d 512 (6th Cir. 1975), *cert. denied*, November 15, 1975, No. 75-1105 and *Williams, supra*[9] which express concern for the effect of accommodation upon other employees. Furthermore, unlike the situation in *Claybaugh* v. *Pacific Northwest Bell Telephone Company*, 355 F. Supp. 1 (D. C. Ore. 1973), TWA affirmatively sought union help in the accommodation process. Once that requested help was met with a union refusal to vary seniority, it would be onerous to require TWA to act contrary to such an express union directive, particularly in the absence of any past or present actual discriminatory conduct. Thus, this case does not present a vague fear of mild problems. In the eyes of the people who were on the line handling the problem and dealing with the union on a day-to-day basis, a serious question existed concerning the ability to schedule work fairly and efficiently (A. 135, 140). Any other approach ignores the reality that part of TWA's business requires the management of thousands of employees (A. 207-209). *Dawson* v. *Mizell*, 325 F. Supp. 511 (E. D. Va. 1971). In a complex industrial system one cannot afford to wait for chaotic conditions before taking preventative action.

Extra Expense and Work Coverage Problems. Unlike *Cummins* v. *Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), *aff'd* by an equally divided court ..... U.S. ....., 50 L.Ed.2d 233 (1976) *set* for *reh. pending*, this case squarely presents an employer who would have incurred overtime wage ex-

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9. In the field of religion and the Constitution, the Court has stressed the importance of avoiding *potential* strife.

pense or work coverage problems. The court of appeals, however, rejected any factual consideration thereof whereas the district court made express findings on this issue (A. 244, see also TWA's Brief, pages 53-59). Moreover, one cannot simply look at the extra cost of overtime for one employee because Section 701(j) extends to *all* religious practices of *all* employees. The increasing litigation over religious accommodation issues, and the large number of religions, establishes that it would be shortsighted to limit consideration of incurred expense to only one employee.

Realistic Availability of Substitute Employees. Hardison was the only employee scheduled in his essential job on Saturdays. While much has been made of the so-called 200 available employees that figure is illusory and came about in response to a question from the district which assumed no restrictions on seniority (A. 134-135). Hardison, the amici and the court of appeals are, however, all laboring under the misconception that TWA could simply assign workers from a nonexistent "pool" or request volunteers to swap with Hardison. Under the applicable collective bargaining agreement any and every job opening or opportunity for overtime had to be filled by the seniority list (Resp. Br., p. 17). Once a job opened for whatever reason, it was subject to bidding and it became the *right* of all other employees according to seniority to seek or avoid. In other words, Hardison's job was subject to the relative rights of *all* other employees. If a volunteer was found, more senior employees would have grievances. If a volunteer was not found, another employee's seniority rights would be sacrificed solely to give Hardison special treatment. This fact alone distinguishes this case from those where a true volunteer system existed. It is extremely difficult to actually schedule work in a complex industrial system. It cannot be done equitably unless there is an evenhanded, objective and neutral approach (A. 140 and 150-159). Moreover, for sound reasons, it is the union steward who keeps the seniority list and fills the jobs. That procedure avoids direct or subtle forms of employer coercion in respect to overtime requests. *City of Albuquerque, supra.*

The Possibility of Having to be on Call for Emergency Service. There was an undisputed need to have someone in Hardison's job in the event of an emergency. Hardison, the amici and the court of appeals ignore that fact. They also rather naively say that TWA should have tested or determined whether or not the job really had to be filled or whether some other employee or shop function actually suffered (Resp. Br., p. 21). That suggestion flies in the face of common sense, the contractual obligation requiring reduced work forces at overhaul bases on the weekends and the general preference of high seniority employees not to work on weekends.

Affirmative Efforts to Accommodate. The basic defect in Hardison's argument that TWA made no efforts to accommodate stems from a mistaken factual impression. Illustratively, Hardison concludes, apparently by underscoring a portion of an exchange between Judge Oliver and Mr. Stone, that TWA would do nothing to accommodate employees (Resp. Br., p. 18). Mr. Stone testified *inter alia*, that, ". . . Well, we would try wherever we could to make adjustments, . . ." (A. 154-155). If there is anything wrong with that policy, the defect is so subtle that it escapes one's imagination. Judge Oliver's persistent trial efforts would have detected any veiled or latent refusal to accommodate. Moreover, the quoted exchange has nothing to do with Hardison specifically.

TWA's affirmative accommodation efforts were obvious to the district court in the form of granting Hardison days off for his religious holidays; holding meetings with Hardi-

son to seek accommodation, including the one Kussman initiated; seeking union cooperation, agreeing to waive any seniority provisions and in directing the union steward to seek swaps (A. 207-208). Those district court findings are simply above reproach in the circumstances of this case. However, in its *de novo* review, the court of appeals cast TWA as a "Pontius Pilate" (A. 254).

The Employee's Cooperation. Hardison now somewhat righteously argues that he offered to work "any hours", take any "combination of days off" and work "any shift". He says he was "agreeable" (Resp. Br., pp. 18-19). That claim overstates the facts because only two months prior to March of 1969, Hardison voluntarily transferred from a shift assignment where he had sufficient seniority to avoid any work on his Sabbath to one where he knew he could reasonably expect Saturday work. That transfer alone supports dismissal of Hardison's case. Yet, the district court, in its more than generous view toward Hardison, held only that such action should ". . . be viewed as a frustration of TWA's attempts to accommodate, and not as an action which relieved TWA of the duty to accommodate" (A. 208).[10] Moreover, the district court properly considered the fact that neither TWA nor the union could divorce themselves from the duties they had to other employees and union members (A. 223-229 and 244). But,

10. Despite the transfer, TWA did not thereafter refuse to make further efforts at accommodation. Kussman actually initiated the March 6, 1969 meeting out of his concern over the scheduling problems. Moreover, Hardison and the amici fail to acknowledge TWA's continuing agreement to accommodate Hardison's religious holidays. That accommodation indicates no animosity by TWA because of the voluntary transfer. The days off also represented an important accommodation insofar as Hardison's religion was concerned. Illustratively, a school system in California is now engaged in litigation because it believed it could not reasonably accommodate a teacher's observance of the World Wide Church of God's special religious holidays. *Rankins v. Commission on Professional Duties*, # 5-Civil-3010 California Court of Appeals, 5th Appellate Division.

in its *de novo* review, the court of appeals ignored such facts (A. 255). Compare with *City of Albuquerque, supra,* and the decision on the remand in *Yott, supra.*

An inconsistent point in Hardison's position is the treatment accorded TWA's argument that, under the court of appeals decision, employers could not hereafter prove an inability to accommodate without undue hardship. Hardison's rejoinder was, "That may well be the point that Congress was trying to make" (Resp. Br., p. 19). In other words, Hardison admits, as indeed he must, that TWA's feared result is a reality. Yet, in later seeking to salvage the constitutionality of the scheme, he asserts that "Congress has not written an absolute; an employer is not always required to accommodate whatever religious beliefs his employees have" (Resp. Br., p. 38). Hardison cannot have it both ways. At any rate, Hardison and the amici ignore the relevant facts and circumstances surrounding TWA's efforts to accommodate. Also ignored is TWA's business need to be fair with its other employees, to fill its continuous operation job requirements without extra expense, and to protect its relationship with the union. To ignore those real and important facts reads the word "reasonable" out of the statute. The district court properly believed the word "reasonable" had to be considered (A. 240) and that a "hypertechnical" application of the words "undue hardship" would impose a priority of the religious over the secular (A. 226).

In summary, the findings by the trial judge who observed the witnesses establish that TWA's affirmative efforts to accommodate Hardison were serious and substantial. The decision to terminate was made in the good faith belief that business necessity compelled the action taken. There was no intentional discrimination. In reversing the district court's findings on its *de novo* review,

the court of appeals exceeded its proper duty of appellate review. Its view of TWA as a "Pontius Pilate" is totally belied by a fair reading of the entire record. For this reason alone, the judgment below should be reversed. More importantly, if the accommodation scheme is to be applied in a reasonable and fair manner for all concerned parties, the approach of the district court provides a more stable and evenhanded method of analysis than the exceedingly strict and rigid result created by the court of appeal's *de novo* review.

II. The Establishment Clause Governs And Renders The "Reasonable Accommodation-Undue Hardship" Requirement Unconstitutional.

The core constitutional issue is not Hardison's freedom of religion. He has that right, and will have it no matter what decision is reached here. The pertinent issue is whether the federal government can, at an individual's behest, coerce private persons not only to accommodate the religious beliefs of others but to do so unless they can prove "undue hardship."[11]

The Establishment Clause forecloses government requirements that a private individual or a group support the religion of another with contributions regardless of how large, small or infrequent the occurrence. *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947) (see also the Seven-Day Br., p. 27). There is no difference in principle in such forbidden action and the requirement of "reasonable accommodation-undue hardship". In the present case, a private employer and its other employees are legally coerced to yield to the religious beliefs or practices of an employee and to incur extra costs or accept infringement of their contractual and nondiscriminatory seniority rights.

11. There really is no discrimination here because wholly neutral and secular work rules are involved. Moreover, the free exercise rights of other parties are interwoven in the accommodation process. Just as Mr. Justice Rutledge observed in his dissent in *Everson* at p. 58, "Of course, discrimination in the legal sense does not exist."

There can be no question that Hardison is demanding preferential employment rights based solely upon his religious beliefs. By such preferential treatment, the accommodation scheme imposes the religious beliefs of one on others. It effectively aids various religions in their proselytizing functions. It places religious believers in a superior position over the nonbeliever. It creates a situation ripe with potential religious strife on the secular job site. It unavoidably prefers some sects over others. It entangles government with religion in an administrative setting that has the seeds for ever-increasing involvement. In summary, the statute and guideline are pervasive aids to religious activity.

Hardison and the amici conduct an extensive search for some rationalization to support the accommodation requirement. Various alternatives include the Commerce Clause, Necessary and Proper Clause, the Fourteenth Amendment and the Free Exercise Clause. However, none of those alternatives recognize that the First Amendment stands as a barrier to both obvious and subtle departures from the express mandate that Congress shall make *no* law respecting an establishment of religion. The Establishment Clause is an affirmation that no unneeded and undue erosion can take place.

That is not to say, however, there is no play in the Establishment Clause. Past cases of this court recognize that inescapable truth. However, the counter arguments advanced in this case are overstated and prove too much and if accepted would render the Establishment Clause a

nullity. Moreover, the counter arguments are not new but have been presented and rejected by the Court on previous occasions. In fact, many of the present amici have, in the past, strenuously argued against the theories they now champion[12] thereby bringing to mind the observation that religious groups, ". . . all are quick to invoke its protections [the Federal Constitution]; they are all irked when they feel its restraints". *Everson, supra* (dissent of Jackson, J.), p. 27.

In *Nyquist, supra,* at pages 782 n. 38, 783 n. 39 (1973), the Court rejected the notion that grants to parents of private school children were necessary to equalize their position vis-a-vis public schools because that argument would provide a basis for approving the complete subsidization of all religious schools—a result wholly at variance with the Establishment Clause. Moreover, the so-called "equalization theory" has the effect of aiding a church in its proselytizing function thereby causing strife among religions. As Mr. Justice Frankfurter cogently observed in his concurring opinion in *McGowan* v. *Maryland*, 366 U.S. 420, 463 (1961):

> "In view of the competition among religious creeds, whatever 'establishes' one sect disadvantages another and vice versa."

It is absurd for Hardison and the amici to equate a failure or inability to accommodate because of secular reasons with religious discrimination or unequal treatment under the Constitution. In fact, the real inequality created by the accommodation scheme results from Hardison's receiving preferred treatment solely because of his

12. See Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment?*, 1973 Supreme Court Review 57, 60.

religion.[13] Hardison is receiving special privileges that are not available to nonreligious employees. Employees with other religious beliefs may or may not receive comparable privileges based upon their religious needs. Thus, aid of the character given Hardison imperils the liberties of the nonbeliever and other believers. *Abington School District* v. *Schempp,* 374 U.S. 203, 305 (1963) (Opinion of Goldberg, J.).

The accommodation requirement creates government coercion enhancing not only the practice of religious beliefs but also the choice of religious beliefs. Government is, therefore, facilitating a "church's efforts to gain and keep adherents". *Abington, supra,* at 228 (Opinion of

13. One amicus tries to demonstrate that Hardison is not being granted preferential treatment (COLPA Br., pp. 15-24). However, it concedes that preferences are given because it says the preferences are no different from aid to handicapped workers. Hardison is not handicapped and the Establishment Clause has no conceivable relationship to handicapped workers. The amicus concedes as much by arguing that *McGowan* v. *Maryland,* 366 U.S. 420 (1961) and *Sherbert* v. *Verner,* 374 U.S. 398 (1963) uphold the preference here. That those cases do not do so is implicitly conceded by the amicus' conclusion that the firmly established "tripartite" test should not be applicable to this case. At any rate, neither *McGowan* nor *Sherbert* supports the idea that an exception must be given to religious sects from general secular duties. As Chief Justice Warren observed in *McGowan* at p. 453:

> "We do not hold that Sunday legislation may not be a violation of the 'Establishment' Clause if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the state's coercive power to aid religion."

In other words, the accommodation scheme is not entitled to an "exemption" because on its face and in its effect it uses the State's coercive powers to aid religion. That is undoubtedly why the amicus felt impelled to urge its new "test". Nonetheless, that proffered test is not at all suited for application to the Establishment Clause issues in this case. *Nyquist, supra.* See also Freund, *Public Aid to Parochial Schools,* 82 Harv. L. Rev. 1680, 1692 (1969). While Professor Freund agrees that political debate may be wholesome in some contests, in the "field of God and Caesar" he prefers the binding quality of judicial decisions.

Douglas, J.). Hardison and the amici have failed to demonstrate any way in which the accommodation scheme permits the government to remain neutral (in any sense) in the battle to gain and keep adherents.

The accommodation scheme has none of the recognizable virtues of voluntarism. Employers and other employees are forced to bear the costs of the burdens of conscience that ought to be borne by the employee. Rather than not coercing persons either into or away from support for religious practices, the government has established a far reaching bureaucracy to police and implement the regulatory scheme. Federal courts are compelled to make factual resolutions as to what establishes reasonable accommodation or undue hardship. One of the incurable constitutional vices is that to some religious sects no reasonable accommodation short of actual accommodation could ever satisfy their beliefs. Expectations are bound to be dashed. Ill will among employers and employees is bound to be nourished. Disappointment and mistrust of government is likely to result. Sects and employees will not understand why their sincere beliefs are accommodated in one case and not in all cases or why one sect is accommodated and they are not. Employers will not comprehend why they must accommodate while another does not. Compare *Johnson, supra; Reid, supra* and *Williams supra* with the result of the court of appeals in this case. Political and religious strife at the job site is bound to flourish. Many of the cases already adjudicated under the scheme reveal constant employee complaints. There is no sign of abatement. See, for example, *Parker Seal Co., supra; Williams, supra; Reid, supra* and *City of Albuquerque, supra.*

The refusal of some religious sects to accept the good faith of employers is illustrated in this case. The district judge who saw the witnesses had no doubt that TWA and

the union acted in complete good faith. One of the amici, on the other hand, suggests that TWA did not really object to the constitutionality of the accommodation scheme but had become ". . . so large and insensitive to individual employee's needs that it simply does not want to be bothered . . ." (World Wide Br., p. 17). That truly shocking and irresponsible statement demonstrates the position in which employers and unions are placed in dealing with the accommodation requirement. A review of the entire record would convince any fair-minded person that TWA's employees on the line handling the problem were caring and sensitive toward Hardison. In the best tradition of tolerance, TWA employees initiated and sought accommodations. They respected Hardison's beliefs. They wished him good luck in his relationship with his church. They agreed to waive the collective bargaining provisions. They granted Hardison special days off for religious observance. They only balked when the rights of other employees were involved and when the union refused to waive the seniority rights of other employees. At that point, TWA's own job requirements and incurrence of expense or lack of work coverage prevented further accommodation.[14] The answer

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14. It is a sad commentary to believe, as the amici do, that intolerance would reign supreme if the accommodation scheme is held unconstitutional. To the contrary, the affirmative actions of Mr. Kussman were undertaken to help Hardison as a person and not just to comply with a government mandate that TWA had to honor Hardison's religion. The amicus' argument does raise the spectre of even further government entanglement with religion through government mandated affirmative action programs for religious quotas or the building of mosques in industrial plants to facilitate prayer services. It would not be an undue hardship for Chrysler or General Motors to build such chapels or places of prayer for Black Muslim assembly line workers. Yet, the free exercise rights of other religionists or atheists who are offended by job site devotionals would be infringed. See, for example, *Young* v. *Southwestern Savings & Loan Ass'n*, 509 F.2d 140 (5th Cir. 1975). The accommodation scheme is essentially unworkable both politically and administratively and therefore is apt to lead to strife. *Walz* v. *Tax Commission*, 397 U.S. 664 (1970).

to that amicus is that TWA firmly believes the statutory scheme is unconstitutional and presents the exact fear expressed by Judge Celebrezze's dissent in *Parker Seal, supra*. If Congress is permitted to breach the First Amendment by granting benefits to religion, it is thereby impowered to breach it to take away religious freedoms. The fear of government aiding religious practices, aiding in proselytizing activities and imposing religion upon a secular environment is made a stark reality that every citizen should be concerned with and take action to stop. TWA fully supports its employees who were on the line handling this issue.

Nor does the accommodation scheme further any concept of mutual abstention. To the contrary, rather than keeping religion out of the job or the job out of religion, consideration is required of each employee's religious beliefs and practices in all job assignments, duties or responsibilities. Religious practices become a pervasive consideration in what was heretofore a secular setting.

Hardison and the amici rely heavily on *Sherbert, supra; Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) and *Zorach* v. *Clauson*, 343 U.S. 306 (1952) to support their affirmative freedom of religion and "exemption" arguments (Resp. Br., p. 27 and Am. Jewish Com., et al. Br., p. 12). Those cases do not support their arguments.

Hardison's application of *Sherbert* would, in essence, reject, rather than merely subordinate, cases such as *Everson, supra*, and *Abington, supra*. Moreover, if the free exercise clause did not require released time in *McCollom* v. *Board of Education*, 333 U.S. 203 (1948) or mandate an exemption for Sabbatarians in *Braunfield* v. *Braun*, 366 U.S. 599 (1961), it is impossible to perceive how it could here require an employer to accommodate an employee's religious beliefs in the absence of "undue hardship". Hardison's rigid application of *Sherbert* also ignores that the Establishment Clause protects vital civil rights such as preventing government imposition of religion, the enhancing of religious beliefs of others and avoiding religious strife.[15]

Unlike *Gillette* v. *United States*, 401 U.S. 437 (1971) and *Sherbert*, Hardison had no fear of a severe criminal penalty or of being destitute. In fact, the record reveals that Hardison promptly found other employment (Tr. A. 37-38). Moreover, the impact of accommodation would be directly and immediately felt by the employer and other employees.

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15. The government cannot protect free exercise by promoting religion when that promotion causes any injury to others. The freedom of belief is extensive but the freedom to practice one's religion has limitations. See generally, *Prince* v. *Massachusetts*, 321 U.S. 158 (1944). The freedom of religion, ". . . does not and cannot furnish the adherents of religious creeds an entire insulation from every civic obligation." *McGowan, supra*, at 461 (Opinion by Frankfurter, J.). The Free Exercise Clause does not require that government must render affirmative aid to religion. *Abington, supra*, at 292-299 (Opinion by Brennan, J.). Justice Douglas characterized the first amendment as containing the command, ". . . that no one need bow to the religious beliefs of another", *McGowan, supra*, 575 (dissenting opinion) and, ". . . It may not thrust any sect on any person." *Zorach, supra* at 314. Thus, in *Gallagher* v. *Crown Kosher Super Market*, 366 U.S. 617, 620, 627 (1961) the court noted that the secularist purposes of the Sunday laws were to create an atmosphere of recreation rather than religion and that Sunday business or labor by Sabbatarians was not prohibited, ". . . *so long as it disturbs no other person*" (emphasis supplied). Here, Hardison can practice his religion as he wishes so long as he does not impose upon TWA, the union, or other employees in respect to non-discriminatory uniformly applied work rules. As stated by Justice Rutledge in his *Everson*, dissent at 63:

> "We should not be less strict to keep strong and untarnished the one side of the shield of religious freedom than we have been of the other."

The same concern was expressed by Justice Jackson in his *Everson* dissent at page 27. Religion cannot be a private affair when restraints are imposed and a public affair when it comes to adding burdens on other faiths or those of no faith at all.

Unlike *Yoder, supra,* the granting of preferential treatment to Hardison generates government coerced exceptions to otherwise neutral and evenhanded employment rules. Further, Hardison, in sharp contrast to *Yoder,* thrust himself into a secular activity rather than seeking to be part of an integrated and self-contained social unit.

In *Zorach, supra,* nobody had to substitute for the pupil who was released for prayer; whereas, another employee had to fill in for Hardison. TWA also had to pay overtime wages or deprive other areas of work coverage. Further, the saving feature of *Zorach,* in contrast to here and *McCollom, supra,* was the absence of state coercion. Similarly, while the state could encourage or cooperate with religious exercises, it could not, ". . . use secular institutions to force one or some religion on any person". Nor could government coerce anyone to, ". . . observe a religious holiday". *Id.* 314. Here, the government is forcing private persons to bow to the religions and religious holidays of others.[16]

One amicus observes that neither the district court, court of appeals, nor any other court has found the accommodation requirement unconstitutional (Am. Jewish Com., et al., Br., p. 10). However, the district court's constitutional analysis was limited to the factual findings it made rather than those substituted by the court of ap-

16. *Welsh* v. *United States,* 398 U.S. 333 (1970) and other cases such as *Marsh* v. *Alabama,* 326 U.S. 501 (1946) are often relied upon by either Hardison or the amici. However, those cases are inapposite. Indeed, the idea that TWA's overhaul base could be construed as a "company town" is a simplistic notion having no relationship to the reality of the presence of strong, cohesive unions and the utter lack of any of the trappings of a town such as housing units. TWA, like Hardison, exists in a complex secular society not in a protected, private community.

peals.[17] Moreover, the existence of grave constitutional issues has dogged the reasonable accommodation requirement from its exception.[18] The dissent of Judge Celebrezze in *Parker Seal, supra,* demonstrates the concern expressed over the accommodation requirement's constitutionality. Indeed, the court of appeals noted that TWA's constitutional argument was ". . . not without articulate support" (A. 264). That articulate support is expanding as demonstrated by the January 10, 1977 decision by Judge Real, who, upon the remand in *Yott, supra,* declared the accommodation scheme unconstitutional. See *Yott* v. *North American Rockwell,* 14 FEP 445 (C. D. Cal. 1977). At any rate, consideration of *Nyquist's* three-part test confirms the constitutional invalidity of the accommodation requirement.

1. *The Accommodation Requirement Reflects a Sectarian Purpose.*

Hardison and the amici place great reliance upon this Court's not having found any congressional act violative of the Establishment Clause because of a lack of a secular purpose (Resp. Br., p. 29). But see *Abington, supra,* and *Epperson* v. *Arkansas,* 393 U.S. 97 (1968). The answer is obvious; no other legislative scheme has presented such a facially obvious sectarian purpose.

On the remand in *Yott, supra,* Judge Real stated that to ascribe a secular purpose to the amendment would be

17. The district court did not believe the employer could be required to finance the religious beliefs of employees (A. 244). The amicus' own counsel has seriously questioned the scheme's constitutionality. L. Pfeffer, *God, Caesar & The Constitution,* p. 335 (1975).

18. See, for example, Edwards & Kaplan, *Religious Discrimination and the Rule of Arbitration Under Title VII,* 69 Mich. L. Rev. 599, (1971) and the other legal commentaries collected in TWA's initial brief, p. 24 n. 10.

"pure sophistry". *Id.* 448. That common sense and direct observation is most refreshing. Senator Randolph also was not bashful in admitting that the purpose was to aid certain sects (see TWA's Br., pp. 37-40). Senator Randolph's remarks must be attributed as the purpose of the amendment. He was the author and sponsor. No senator rose to dispute him. Likewise, the amici are not bashful in admitting that Saturday Sabbatarians are directly benefited and in arguing that the amendment is, and was, needed and intended to equalize minority religions.[19]

This case does not present a vivid legislative preamble indicating a "reasoned" legislative response to a supposed massive existence of religious discrimination in private employment (*cf.* COLPA, Br., pp. 10-11). To the contrary, there is scant evidence, if any, that Congress found any such discrimination. See generally Edwards and Kaplan, *supra*, at pp. 600-602 n. 10. Given the void of any cogent rationalization of the accommodation scheme as anything other than a measure to aid religion and certain sects in particular, the law is unconstitutional because of its purpose. When the language of the law and its legislative history are considered together, the purpose to aid religion is evident.

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19. The heavy reliance on *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971) by Hardison and the amici is really superfluous to any consideration of the amendment's purpose. *Griggs* has no relationship to the First Amendment.

Hardison and the amici assert that petitioners have not challenged Title VII's basic prohibition against religious discrimination. That issue is not before the Court and need not be challenged at this time. However, if that basic prohibition means the same thing as "reasonable accommodation-undue hardship", then it is unconstitutional just as the amendment and guideline here at issue. TWA makes no concession that the basic prohibition insofar as it relates to religious discrimination may or may not be constitutional.

2. *The Primary Effect of the Accommodation Requirement Is Sectarian.*

Hardison's argument against the "primary effect" of the amendment and guideline is that it does not *advance* but rather *protects* ". . . the religious freedom of those who observe a day other than Sunday, as their holy day of rest" (Resp. Br., p. 32). Yet, in nearly the next breath, Hardison argues that, ". . . there is no effect on religion in the present case." (Resp. Br., p. 32). On whichever ground Hardison ultimately bases his argument, the cases do not support the notion that a law found to have an effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion. See *Nyquist, supra,* 783 n. 39. *McGowan, supra, Abington, supra,* and *Tilton* v. *Richardson,* 403 U.S. 672, 683 (1971). In the latter case, the Court found that the mere possibility that a federally funded structure might be used for religious purposes 20 years hence was constitutionally unacceptable because the grant might, ". . . *in part* have the effect of advancing religion" (emphasis added).[20] More importantly, the various programs at issue in *Nyquist* undoubtedly protected the right to send children to a religious school but they also failed to satisfy the constitution because they advanced religion.

The primary effect of the religious accommodation scheme is a direct aid given to religious activity. The government's enhancement of religious practices is more pervasively sectarian than the aid in *Nyquist.* Regardless of any other assumed benefit other than a nonreligious benefit, there remains a substantial advancement of religious activ-

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20. The government is not made the less neutral by not giving what it cannot give in the first place. *Everson, supra* at 40-41 (dissenting opinion by Rutledge, J.).

ity. Essentially religious activities of religious individuals and institutions are being supported by the government in an otherwise secular work situation. Thus, the advancement of religion is markedly more pronounced and direct than in *Tilton, supra* or *Nyquist, supra.* The religious character of the aid here cannot be characterized as secular when compared to the purely secular school books in *Board of Education* v. *Allen,* 392 U.S. 236 (1968) or the transportation available to all citizens in *Everson, supra.* There simply is no comparable secular benefit available to all workers.

Hardison, however, argues that the primary benefit supposedly accrues to individuals and therefore passes constitutional muster (Resp. Br., p. 33). That argument misses the mark. The benefit directly enhances the individual's actual practice of his religion. Hardison's argument is really one of form and not substance because the Establishment Clause says Congress can pass *no* law. What may not be directly done certainly cannot be accomplished by indirect tactics. *Abington, supra.* Further, the arguable indirect benefit of tuition grants was not permitted in *Nyquist, supra* and the benefit here is much more religious in nature than education.

Hardison supports his discussion of "effect" by taking out of context a quote from Chief Justice Burger's dissent in *Nyquist, supra* (without identifying the quote as coming from a dissenting opinion). Just prior to the extracted quote, the Chief Justice, in describing his dissenting philosophy that aid to individuals generally stands on a different footing, stated at 801-802:

> "I say 'generally' because it is obviously possible to conjure hypothetical statutes that constitute either a subterfuge for direct aid to religious institutions or a discriminatory enactment favoring a religious over non-

> religious activities. Thus, a State could not enact a statute providing for a $10 gratuity to everyone who attended religious services weekly. Such a law would plainly be governmental sponsorship of religious activities; no statutory preamble expressing purely secular legislative motives would be persuasive."

The government here is sponsoring religious activities with a discriminatory impact upon the employer, other employees and other religions. Thus, the grant of aid to individuals does not salvage the accommodation scheme. Secular activity is discriminated against and the primary effect remains one of substantially advancing aid to and on behalf of religious activity. Here, rather than a $10 grant, to persons who attend religious services, the government coerces a day off to attend religious services. The principle is the same. Finally, the interface of the government with a religious activity is not obviated by the aid being given to the individual. The government's involvement with the accommodation scheme is pervasive and continuing because its role is not satisfied by a mere grant of a credit. Investigations, inspections, coercion and controversy over the accommodation scheme are inevitable and indeed are called for by the law.

Hardison digs himself a deeper hole by asserting that the primary effect is somehow diluted because all aspects of religious observance and all religions are equally covered (Resp. Br., p. 34). The argument falls of its own weight. Indeed, that reasoning runs headlong into Mr. Justice Frankfurter's teaching in *McCollom, supra,* at 227 that:

> "Separation is a requirement to abstain from fusing functions of government and of religious sects, *not merely to treat them all equally.*" (Emphasis added).

Hardison and the amici make the supposition that, if he worked for the government, *Sherbert* would have protected him (Resp. Br., p. 35) (COLPA, p. 30). Why that assumption follows is left unexplained. *Sherbert* does not compel a decision for Hardison. Further, government agencies have been sued in their capacity as an employer in nearly identical situations to the case at bar. See, for example, *Johnson* v. *United States Postal Service*, 497 F.2d 128 (5th Cir. 1974) and *Dawson* v. *Mizell*, 325 F. Supp. 511 (E. D. Va. 1971). In both cases, the government's action of dismissing the employee was upheld. Indeed, in *Dawson*, Judge Merhige rejected the claim that *Sherbert* was in any sense applicable and held that discrimination could not be equated with a failure to accommodate. There, as here, a collective bargaining agreement covered a large number of employees who regarded seniority rights with "utmost importance". At any rate, the actions of the government are not at issue in this case except insofar as the passage of the amendment and guideline are concerned.

Hardison's argument that sincerity is not at issue is not correct (Resp. Br., p. 37). Sincerity must be considered in the accommodation setting in this and all other cases. More importantly, any government that endeavors to extend so-called exemptions to the "faithful" will "truly be government beseiged by the faithful". *Morgan, supra*, at 97.

3. *The Statute and Guideline Require Excessive Entanglement of the Government in Religion.* Hardison asserts that no excessive government entanglement is present. While it is difficult to perceive the underlying rationale for that position, Hardison appears to argue that § 701(j) only ". . . fosters consideration for the schedules of working men with *sincere beliefs*. . ." (Resp. Br., p. 39, emphasis added—compare with his assertion that sincerity is not an

issue). The same apparent theme that accommodation merely serves as a gentle catalyst to bring employee and employer together thereby ". . . *forcing* on the employer a genuine examination of his own business needs" is made by the amici (COLPA Br., p. 14, emphasis added). The numerous cases already in existence and the rather strident positions urged by the amici demonstrate that the search for reasonable accommodation without undue hardship is a difficult and controversial issue that will entail government involvement.

The concessions that Hardison makes in respect to Congress not writing an "absolute" and that in some cases an employee's religious beliefs "must give way" (Resp. Br., p. 38) underscores the extensive entanglement required of government through investigation, conciliation efforts and enforcement of governmentally designed rules. The pervasive religiosity and direct government involvement in the accommodation process involving nearly all employers and employees across the country is unjustifiable. As stated in *Abington, supra*, 307 (Opinion by Goldberg, J.) in respect of the government's role in school prayers:

> ". . . and utilizing [its] prestige, power and influence of school administration, staff and authority *cannot realistically be termed simple accommodation* and [it] must fall within the interdiction of the First Amendment." (Emphasis added).

Hardison's reliance upon *Walz* is misplaced. The tax exemptions there at issue had a long-standing history creating no excessive entanglement either administratively or politically. The importance of *Walz* is best understood when one considers that symbolically, in this country, the power to tax has implied the power to destroy. Thus, the principle of neutrality was best served by the government's

nonexercise of that power. Here, the government involvement necessarily entails official and continuing surveillance. The indisputably religious character of the aid renders the scheme pregnant with involvement. Furthermore, the right to apply uniform work rules without discriminatory intent is firmly embedded in the fabric of our large industrial systems.

Ordinary debate may be helpful in political issues but, the Constitution sought to avoid devisive debate concerning religious issues. Freund, *supra*, and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). As the Court stated in *Lemon* at p. 626:

> "The Constitution decrees that religion must be a private matter for the individual, the family and the institutions of private choice, and that while some involvement and entanglement are inevitable, *lines must be drawn.*" (Emphasis added).

The line must be drawn against the accommodation scheme. Religion must remain a private matter. Otherwise, it will henceforth be exceedingly difficult for the Court to find a foothold to prevent erosion of the Establishment Clause.

CONCLUSION

The decision of the court of appeals must be reversed both on the facts and the applicable law. The accommodation scheme is unconstitutional under the Establishment Clause.

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U. S.
F I L E D
MAR 28 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 75-1126 and 75-1385

TRANS WORLD AIRLINES, INC., *Petitioner*
and
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT 142, AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS LOCAL LODGE 1650, *Petitioners*
v.
LARRY G. HARDISON, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL., PETITIONERS

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LARRY G. HARDISON, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL., PETITIONERS*

INTRODUCTION

The Real Issues

A principal contention of our adversaries is that because we insist that the rights of employees under

* In addition to the Brief for Respondent, referred to hereinafter as "R. Br.," seven briefs *amici* have been submitted in support of respondent's position. They are referred to as follows: United States and Equal Employment Opportunity Commission, "Gov't"; Seventh Day Adventists, "Adventists"; Central Conference of American Rabbis, et al., organizations affiliated with the Synagogue Council of America and the National Jewish Community Relations Advisory Council, "Synagogue Council"; COLPA; Worldwide Church of God, "Worldwide"; New York State Division of Human Rights, "New York", and the State of Michigan". We refer to our opening Brief as "U. Br."

a collective bargaining agreement be preserved, we are elevating the agreement above the statute. (R. Br. p. 11; Adventists Br. p. 56; COLPA Br. p. 28.) Not so. Of course we recognize that rights under a collective bargaining agreement, like other contractual rights and property interests in general, are "subject to modification by law" (Adventists Br. p. 56). What we do contend is that Congress did not, in § 701(j), choose to modify or abrogate those rights of employees. By falsely imputing to us a hierarchy of values which elevates the agreement above the statute, where these are in conflict, our adversaries evade the basic statutory issue, which is whether § 701(j) does conflict with employee rights under a collective bargaining agreement. And they also place in a false light the constitutional issue, which is whether under the Establishment Clause the rights of some employees may be abrogated in order to facilitate religious observance by others.

It is well also to have in mind at the outset why the issue is stated in terms of employee rights under a collective bargaining agreement. It is not because rights under a collective bargaining agreement have any greater legal dignity than rights created by an individual contract between an employer and an employee where there is no collective agreement.[1] In

[1] Of course, where there are both individual and collective agreements, the latter must prevail, *J. I. Case Co.* v. *Labor Board,* 321 U.S. 332, 338-339 (1944); *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U.S. 342, 346-347 (1944). COLPA's disparaging reference to the Union's refusal on principle to allow exceptions to its hard-won contract rights (Br. p. 33), and similar references by respondent and other *amici,* betrays either unfamiliarity with or disdain for the rationale of collective bargaining, which is at the root of our national labor policy. Neither the language nor the legislative history of § 701(j) gives any indication that Congress intended to modify that policy or to subordinate rights under collective agreements to the interests of individual employees.

either event, the agreement creates a property right in the employee. See *Board of Regents* v. *Roth,* 408 U.S. 564, 577 (1972); *Perry* v. *Sindermann,* 408 U.S. 593, 601-602 (1972). Thus, we answer in the negative the rhetorical question: "Is the contract between the employer and the representative of a majority of its employees entitled to greater weight than the express or implied terms of an individual employment contract?" (COLPA Br. p. 28.)

The reason our position is stated in terms of rights under a collective bargaining agreement is two-fold: First, and most obviously, the employee rights involved in this case are, in fact, created by a collective bargaining agreement. Second, as a matter of industrial reality, it is probably only in collective bargaining agreements that one finds provisions which, expressly or by implication, create in employees seniority rights or in any other way diminish the employer's managerial prerogative to establish working conditions, including the authority to determine which employee will work when. Individual employees rarely, if ever, have the bargaining power to restrict the employer's total authority to assign work; this is "the necessit[y] of the situation" which, as Mr. Chief Justice Taft long ago recognized, leads to organization by employees. *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U.S. 184, 209 (1921).

Thus, COLPA's question is not only rhetorical, but of merely academic interest. What is important, indeed what is at the heart of the constitutional and statutory issues in this case, is the circumstance that this case *does* involve the collective bargaining rights of non-Sabbatarian employees. It is the presence of these employees and their collective bargaining rights which creates in this case statutory and constitutional

issues which were not before the Court in *Parker Seal Co.* v. *Cummins,* nor (as we shall develop at pp. 4-5 *infra*) in *Dewey* v. *Reynolds Metals Co.,* 402 U.S. 689 (1971). It is perhaps the most notable characteristic of the briefs on respondent's side that they largely, and in most instances entirely, ignore this essential difference. They thereby evade the basic issues in this case. Our reply will begin by responding to the one argument (consisting of a single paragraph) which does squarely confront our position. We then discuss those of our adversaries' arguments which, while not directly addressed to, can be said to touch upon the real issues.

I. STATUTORY CONSTRUCTION AND RELATED FACTUAL ISSUES

A. The only brief on the other side which even addresses the statutory issue we raise is that of the Adventists, who assert (Br. 56), that "there is no doubt that Congress expected the reasonable accommodation requirement to override provisions of collective bargaining agreements that would block accommodations." The only evidence they cite in support of that assertion is Sen. Randolph's inclusion in the Congressional Record of the decisions in two cases, *Dewey* v. *Reynolds Metals Co.,* 429 F.2d 324 (6 Cir., 1970), aff'd by an equally divided Court, 402 U.S. 689 (1971), and *Riley* v. *Bendix Corp.,* 330 F.Supp. 583 (M.D. Fla., 1971). We may assume that Sen. Randolph intended that by virtue of § 701(j) the plaintiff should prevail "in situations like those in *Dewey* and *Riley*" (Adventists Br. p. 57). But the situation here is not like that in those cases. For the courts in both assumed, as the Adventists say (*id.*), that "a collective bargaining agreement required *all* employees to be

available for work on weekends". (Emphasis added.) Thus, the collective bargaining agreements did not *"block accommodation"* because accommodation did not entail modification or abrogation of any rights of any non-Sabbatarian employees. In this case, however, the agreement did *not* provide that all employees must be available to work overtime or on weekends, but rather gave some employees a right to refuse such work on the basis of seniority, and created other pertinent employee rights. Thus, the legislative history which the Adventists cite is simply irrelevant because it does not establish that Congress intended to "override provisions of collective bargaining agreements *that would block accommodations*" (*Id.* 56, emphasis added), *i.e.*, provisions which create conflicting employee rights.

Another conflicting right of the employees in this case, which those in *Dewey* and *Riley* did not bargain for, is the right to bump in, on the basis of seniority, to permanent job openings created when an employee vacates his job voluntarily to take another. (U. Br. 9.) In *Dewey*, the court specifically found that "swaps", voluntary exchanges, were "an alternate procedure under the contract." 429 F.2d at 330. In *Riley,* swapping was not an issue.[2]

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[2] Adventists concede (Br. p. 61) that a swap would have been "consistent with the seniority assignment system" only "[i]f no one more senior than Hardison wanted the 'graveyard' shift and no one more senior [than the employee willing to swap with Hardison] wanted Hardison's shift * * * *." Where, as here, there were potentially 200 or more qualified seniors (A.24, 68, 104, 133-134), ascertainment whether any had an interest in bumping into either job was obviously feasible only by posting, i.e., putting the jobs "up for bid" (A. 84).

COLPA objects (Br. p. 29) that Hardison was "required to be available on" Saturdays although "he might [have been] able

B. The Adventists, joined on this point by respondent and the Government, state that the purpose of § 701(j) was to approve the EEOC's 1967 Guidelines

to 'bid' out of Saturday work." But Hardison conceded that he did not have the requisite seniority to bid out of Saturday work, and, that, in any event, there was no job not requiring Saturday work he could have bid into (A. 92).

While respondent criticizes the Union's unwillingness to destroy the right of senior workers to an opportunity to bump into jobs involved in a "swap" (Br. pp. 16, 19), he does not even suggest that that unwillingness was discriminatorily motivated. Nor does he attempt to explain (p. 17) how destruction of that right can be reconciled with the plain language of § 703(h), which encompasses all privileges and expectations created by "bona fide seniority • • • system[s]." The Government, which declares that the "seniority system would not be seriously compromised" (Br. pp. 25, 29), offers no such explanation either.

The Adventists would dispose of the conflict by terming expectations of the senior employees not "significant," "substantial," or "serious" (Br. pp. 15, 39, n. 8, 60, 61); but these characterizations are at odds with common knowledge, with this Court's appraisals in *Franks*, (Br. p. 49), and contrast strangely with the overwhelming importance Sabbatarians attach to their own rest days off.

The argument that the Union *should* have waived the contract right of seniors in order to afford a non-contractual preference to Sabbatarians (R. Br. 16; Adventists Br. 14, 56) begs the very question in issue, namely, whether it was *required* to do so by the statute, constitutionally construed (A. 224).

The fact that accommodations were made for occasional absences (A. 134) and for religious holidays (A. 120), and pursuant to occasional recommendations of the Union Relief Committee, does not establish, and the courts below did not find (A. 228-231, 261), that Hardison's permanent religious need was discriminated against, for the record shows (A. 130-131, 134-135, 143-144), that the province of the Committee was limited to exigencies created by temporary "health and family involvements" (A. 131), generally involving adjustments for not more than ninety (90) days (A. 144). It does not appear that the Relief Committee was empowered to or ever did recommend a permanent accommodation which circumvented the right of a senior employee to an opportunity to bid into a job.

(Adventists Br. 46-48; Gov't. Br. p. 16, n. 5; R. Br. 24-26). That proposition does not materially advance their position, because it merely leads to the questions whether the 1967 Guidelines required sacrifice of the rights of one employee to the advantage of another, and whether Congress perceived the 1967 Guidelines as having that effect. Neither their brief nor any other responds to our demonstration that the 1967 Guidelines do *not* provide that the duty to accommodate encompasses a duty to obliterate one employee's contract rights to facilitate the religious practices of another (U. Br. 36-40). The failure of the EEOC to deal with this point is, we submit, particularly revealing. And again, notwithstanding the discussion at U. Br. 43-47, our adversaries simply *assume* that Congress, in ratifying the 1967 Guidelines, understood them to encompass that duty and intended to enact that understanding. While reference is made to Sen. Randolph's statement in introducing § 701(j), we showed in our opening brief that he said nothing from which it could be concluded that he wished to grant Sabbatarians (or other religious observers) a statutory right superceding contractual rights of other employees. And we have shown earlier in this Reply, pp. 4-5, that his reference to *Dewey* and *Riley* does not touch this case either.

There are, in fact, two particularly significant aspects of Sen. Randolph's explanation of § 701(j). The first, which our adversaries perforce attempt to minimize, is that he wished to promote church attendance among Sabbatarians. The second is that he did not state that the exercise of religious beliefs was to be protected regardless of anything else, or specifically that it was intended to override competing rights of

other employees. This in itself is strong evidence that no such meaning should be ascribed to § 701(j). "The silence of the sponsors is pregnant with significance * * * ." *NLRB* v. *Fruit Packers,* 377 U.S. 58, 66 (1964). It is safe to say that § 701(j) would not have been noncontroversial if it had been understood as creating a preference for one group of employees over another because of their religious beliefs or if it had been understood that by the Amendment Congress would, to that extent, depart from the basic understanding of what is and what is not discrimination under Title VII, see pp. 8-15 *infra.* Indeed, against this background, a Senator introducing an amendment which was intended to use "discrimination" in a new and special sense would have been obligated, as a matter of elementary candor, to so state to his colleagues.

C. None of the briefs on respondent's side so much as mentions § 703(j) of the Act which complements § 703(a)'s prohibition of *discrimination against* any employee because of his religion by forbidding also the granting of a *preference to* any employee because of his religion. Nor do they deal with our showing (U. Br. pp. 30-36), that, consistent with the rule of neutrality embodied in § 703, *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), recognized that Title VII does not permit, let alone require, rules which favor one group of employees over another because of religion. This omission in our adversaries' briefs is particularly significant since several of them place heavy reliance on *Griggs,* as they misread that precedent.

Griggs concerned the competition between black and white employees for job openings. This case concerns the competition between Sabbatarian and non-Sabbatarian employees for job assignments that do not require undesired Saturday work. Respondent's side would read *Griggs*' "effects test" to mandate that the rules governing such competition must assure that minority groups shall prevail. But the *Griggs* opinion states that "the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group" (401 U.S. at 431). Thus, the position that "the Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation" (*id.*) does not lead to the conclusion that the rules governing job competitions must favor any group of employees because of their minority status or religious beliefs; rather, it establishes that such rules must provide all groups what is in fact an equal opportunity to secure the benefit in question. As *Griggs* held, and as § 703(h) makes perfectly clear, this means that when a test is used it must be job related. And, as § 703(h) also shows, it means that when the competition is decided on the basis of length of tenure, a uniform neutral "bona fide seniority * * * system" must be used. What the Act assuredly does not mean is that only rules that require non-Sabbatarians to do all undesired Saturday work are lawful.

Adventists do argue, however (Br. pp. 15, 54, 55), that § 703(h) affords no immunity because it is "not intended to define what practices constitute present violations of the main statutory provisions" (p. 15), but (pp. 54-55):

> "*is merely* 'directed toward * * * instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date

of the Act,'" citing *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1975). (Emphasis added.)

But that is a misreading of *Franks*. That case assumes that § 703(h) was included in the Act to preclude a substantive finding of discrimination by application of a bona fide seniority system and does not *merely* insulate such a system where there is no pre-Act discrimination, as there was none here.[3] The Court there overrode seniority rights only as a §706 remedy for proven discrimination.

Adventists would have it that there *is* past and current "discrimination in effect" here simply because the uniform, relevant, work availability requirement has a "disparate effect" on religious observers (*id.*, p. 55). But equation of "disparate effect" *per se* with "discrimination" is unexplicated and unjustified. Nowhere do respondent or any of its *amici* respond to our demonstration that discrimination consists as much of overlooking differences in relevant qualifications, or declaring relevant qualifications irrelevant, as of disparate treatment of those equally qualified in relevant respects. (U. Br., pp. 33-36, 68-69). The problem is evaded by majestic *ipse dixit:* "Whether the [uniform, neutral employment] practices relate to job qualifications or work schedules [which the religious observer flouts] is irrelevant." (Adventists Br. p. 29.) Thus, the entire opposition theory depends upon this Court's acceptance of an Orwellian inversion of the definition of "discrimination."

[3] COLPA concedes this point (Br. p. 29), but argues that the exception for remedial relief implied in *Franks* should result in bestowing on "an observant employee the kind of accommodation that an employer might have available." But that overlooks that absent discrimination *no* relief is warranted, so that the issue remains whether non-discriminatory application to religious observers of a neutral, uniform, availability for work requirement constitutes discrimination.

The Government inaccurately asserts (Br. p. 30), that to give effect to § 703(h) in relation to § 701(j) would make the Act "self defeating." The fact that a general exemption reduces the arguable reach of a subsequent amendment which does not expressly repeal the exemption cannot justify judicial revision of the exemption to expand the effect of the amendment. This Court is not a revisory legislature.

Adversary *amici* argue (Adventists Br. pp. 36-37; Synagogue Council Br. pp. 10-11) that, construed as establishing a discriminatory preference for religious practices, the Randolph Amendment should nevertheless be deemed to have a "secular" purpose because it is merely a "clarifying" or "codifying" amendment to legislation outlawing discrimination. But that context and function cut the other way. Particularly in light of Senator Randolph's assurance that no more was intended than to assure "freedom from religious discrimination" (U. Br. p. 43), they militate against construction which creates a discriminatory perference for religious practices. Whatever may have been Senator Randolph's private understanding, it is hardly likely that "the whole Congress" understood "discrimination" in an Orwellian sense.

That inverted interpretation of "discrimination" was met and rejected in *General Electric Co.* v. *Gilbert,* 45 U.S.L.W. 4031. That case stands squarely for the proposition that it is not "discrimination" within the meaning of Title VII to withhold a benefit from the entire work force, even though the withholding has a more severe impact (or indeed its sole impact)

upon a class of employees which Title VII protects. See particularly *id.* at 4035, text and note at nn. 17 and 18.[4]

The purpose of § 701(j) can be said to be "secular" only if the "accommodation" requirement is construed as *non-discriminatory—i.e.,* as requiring accommodation of religious practices to the same, but to no greater, extent than the enterprise "accommodates" to secular needs, including secular reasons for absence. The test then would be—has the enterprise denied a request for accommodation on religious grounds which it would have granted if the same request had been predicated on a secular ground, *e.g.,* family needs.[5] The employer would have the burden of proof on that issue.

[4] In support of the contention (which several of our adversaries make) that an employer is required, if necessary to accommodate a Sabbatarian, to pay overtime to some other employee, COLPA Br. 33, n. 19, says: "In *General Electric Co.* v. *Gilbert*, 97 S.Ct. 401 (1976), for example, this Court noted, but did not approve of, a 'cost-differential' defense. See 97 S.Ct. at 406 & n. 11." But footnote 11 merely quoted, as part of the statement of the case, a portion of the opinion of the District Court—which this Court reversed. It is footnote 17 which develops this Court's understanding of what it described in footnote 18 as the "longstanding meaning of 'discrimination' ", from which, it held, Congress in Title VII "did not intend to depart." We note also that the dissenting Justices in *General Electric* did not differ with the majority's principle that Title VII's antidiscrimination policy requires conditions of employment to be neutral on the basis of race, sex and religion, but rather on the application of this principle. They disagreed with the majority's "appraisal of General Electric's policy as a neutral process of sorting risks and 'not a gender-based discrimination at all' ", and with its refusal to give weight to the EEOC's views of the issue there.

[5] COLPA seems to be suggesting the same standard when it argues (Br. p. 9), that the adjustment required "has been magnified out of all proportion" because employers "customarily adjust work schedules to the medical, educational, and other personal needs of their employees," and "[r]eligious conviction is entitled to no less respect by employers and employees than medical necessity" (Br. p. 30). However, it shifts to a contrary position (*id.*, p. 9) when it analogizes § 701(j) to 29 U.S.C. § 793(a), which requires "affirmative action to employ and advance in employment qualified handicapped individuals." Apart from the fact that the quoted statute mandates preference only for "qualified" individuals, which religious observers who make themselves unavailable for work at required times, or for certain required work, manifestly are not, COLPA overlooks that there is no Establishment Clause bar against discriminatory preference for persons handicapped physically, or by "age, sex or * * * prior criminal record" (*id.*, p. 10, 12).

It is sheer sophistry to argue, as COLPA does (pp. 16-17), that because a preference can be justified as "reasonable" it is not a "preference." Nor can the preference for religion-oriented reasons for absence be explained away as non-discriminatory on the theory that such reasons are more "somber" (*id.*, p. 16) or "serious" (*id.*, p. 17) than unpreferred secular ones. Is the need of an employee to care for his bedridden parent on the nurse's regular Saturday off, for example, to be considered less "somber" or "serious" than the need of a religious observer? What if the nurse is a Sabbatarian?

The Government's argument (Br. pp. 50-51) that the favored treatment of religious observers is not "preferential" because it merely rectifies "discrimination" against them reflects the same fallacious, question-begging assumption that nondiscrimination is discrimination if it causes "a special burden others do not suffer," even though the "special burden" is the consequence only of relevant differences between the conduct of the burdened group and others.

This non-discriminatory standard would be consistent with the purpose of Title VII, and would not offend the Establishment Clause, because prohibition of *discrimination* against religious practices is consistent with "benevolent neutrality" (*Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970))—the outer limit of permissible Government support of religious observance. See *Roemer* v. *Maryland Public Works Bd.*, 426 U.S. 736, 747 (1976) (Opinion of Blackmun, J.). The constitutional line must be drawn at discrimination in

its "longstanding meaning" (*General Electric Co.* v. *Gilbert, supra,* 45 L.W. at 4035, n. 18), because excuse of religious observers' non-performance of uniform, relevant job requirements, or declaration that, for them alone, relevant job qualifications are irrelevant, or not "sufficiently relevant" (Brief for the United States, pp. 20, 35, 36, 46, 49) is partiality—the antithesis of neutrality—the very advancement and support of religion (U.Br. p. 11), which the Establishment Clause prohibits.[6] Indeed, it has not heretofore been doubted

[6] Contrary to the implication of COLPA's Brief at pp. 6-7,the issue of discrimination turns on whether a neutral job requirement or qualification is pertinent or relevant to the work, not on whether it "can reasonably be avoided." *Griggs* did not define employment barriers as discriminatory simply because they were "unnecessary"; it reserved that definition for unnecessary barriers which were also "artificial," "arbitrary," and "invidious." 401 U.S. at 431. "Certainly, an employer can require that all of his employees * * * meet performance standards, and * * * try to insure compliance * * * so that job performance is not interfered with." *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 544-545 (1971) (Mr. Justice Marshall, concurring). COLPA later appears to recognize this when it asserts (Br. p. 12) that religious observance—unavailability to work when work is required—is "unrelated to employment qualifications"—and therefore constitutes "irrational discrimination". Inasmuch as availability for work when needed is obviously a natural and relevant condition of employment, and is universally understood by employers, employees, unions and arbitrators to be so, COLPA's contrary claim is sheer nonsense.

Equally fallacious is the Government's argument (Br. pp. 35, 46, 49, 51, 52), that uniform, regular attendance requirements may rationally be declared "artificial" and "irrelevant" as applied to religious observers only, unless their exemption would create "undue hardship." There is simply no basis in logic or in *Griggs* for substitution of the criterion "sufficiently relevant" for "relevant" or for equation of lack of "undue hardship" with "irrelevant." What is properly considered "artificial" and "arbitrary" is exemption of *religious* practices *only* from attendance and job performance requirements, for there is not even a pretense that the

that, as Mr. Chief Justice Burger put it in his dissenting opinion in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 801 (1973): "a discriminatory enactment favoring religious over nonreligious activities * * * would plainly be governmental sponsorship of religious activities * * *."

Thus, a construction of § 701(j) in harmony with the general antidiscrimination policy of Title VII, which §§ 703(h) and (j) reinforce, "go[es] in the direction of constitutional policy". *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 134 (1975) See U. Br. pp. 29-30, 42. Examination of our adversaries' constitutional arguments makes this all the clearer.

II. CONSTITUTIONAL ISSUES

A. The arguments advanced by respondent and his *amici* are, in large part, warmed over versions of those which this Court analyzed and rejected in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 780-794 (1973) and *Sloan* v. *Lemon,* 413 U.S. 825, 831-834 (1973). Refutation appropriately begins, therefore, with recapitulation of those holdings. *Nyquist* and *Sloan* decided that state tuition reimbursement and tax credit plans for parents of children attending nonpublic elementary schools violate the Establishment Clause because they constitute forbidden support of religious activities—sending children to religious schools. That

effect on the employer or other employees of absence or nonperformance for religious reasons is any less or any different than identical absences for secular reasons. The argument that because Congress can outlaw subtle as well as obvious modes of discrimination against religion it can also discriminatorily immunize religious observers against the "consequences" (Gov't Br. p. 33), of non-discriminatory attendance policies, provided the impact of exemption is "minimal or can easily be avoided" (Gov't Br. p. 35) is a blatant *non sequitur*. Indeed, it is merely another form of the inversion of the meaning of the term "discrimination" which was discredited in *Gilbert*.

holding was bottomed squarely on the premise (413 U.S. at 780) that

> "It is clear from our cases that *direct aid* [to religious activities] *in whatever form* is invalid. As Mr. Justice Black put it quite simply in *Everson*:
>
> '*No tax in any amount*, large or *small*, can be levied to support any religious *activities* * * *'. 330 U.S., at 16." (Emphasis added.)

Thus, the Court found that aid to parents who send their children to parochial schools, though not in form a tax on those who do not, is condemned by the prohibition of taxation "to support any religious activities."

The Court identified the prohibited support as relief of parents' "financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools" (*id.* at 783). And it held that such relief is "direct aid" even though designed to promote "legitimate secular objectives", because it "also has the direct and immediate effect of advancing religion." *Id.*, at 783-784, n.39, and accompanying text. The Court explicitly rejected the contentions that such aid was permissible because bestowed on individuals rather than on religious institutions (413 U.S. at 781-783) and because it did no more than "equalize the [economic] position of parents who elect [parochial] schools" with those who elect public schools (*id.*, at 782, n. 38; *Sloan* case, *supra,* 413 U.S. at 834).

It was urged in *Nyquist* with respect to the freedom of poor parents to send their children to parochial schools, as strongly as it is here urged with respect to the freedom of employees to refrain from menial work on the Sabbath, that that is a right guaranteed by First Amendment and that aid designed merely to remove strangling economic barriers to that choice must

pass muster under the Establishment Clause because "it is designed to promote the free exercise of religion" (*id.*, at 788). The Court held that the conclusion does not follow from the premises (*id.*, at 788-789):

> It is true, of course, that this Court has long recognized and maintained the right to choose nonpublic over public education. *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925). It is also true that a state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause. But this Court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses, *e.g., Everson* v. *Board of Education, supra; Walz* v. *Tax Comm'n, supra,* and that it may often not be possible to promote the former without offending the latter. As a result of this tension, our cases require the State to maintain an attitude of "neutrality," neither "advancing" nor "inhibiting" religion. [Footnote omitted.] In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one "advancing" religion. However great our sympathy, *Everson* v. *Board of Education,* 330 U.S., at 18 (Jackson, J., dissenting), for the burdens experienced by those who must pay public school taxes at the same time that they support other schools because of the constraints of "conscience and discipline." *ibid.*, and notwithstanding the "high social importance" of the State's purposes, *Wisconsin* v. *Yoder,* 406 U.S. 205, 214 (1972), neither may justify an eroding of the limitations of the Establishment Clause now firmly emplanted.

In several respects § 701(j) as construed by respondent and his *amici* is far more offensive to Establishment Clause principles than the *Nyquist-Sloan* aid programs. In the first place, those programs admittedly had unexceptionable secular purposes—"to perpetuate

a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools"—(*id.*, at 783). Apart from compelling discrimination in favor of religious practices on the pretext of "equalizing" employment opportunities, the accommodation requirement, as we demonstrated in our opening brief, pp. 52-53, has none.[7]

Secondly, in *Nyquist-Sloan* the same aid was provided to parents who sent their children to nonsectarian private schools as to parents who sent their children to parochial schools, so that support was not confined to religious practices, as it is here. Those cases, unlike this one, therefore, did not present "a discriminatory enactment favoring religious over nonreligious activities." 413 U.S. at 801, Mr. Chief Justice Burger, dissenting. Thus, features upon which that dissenting opinion was predicated are absent here. Cf. *id.* at 799-800, 804-805, with 782, n. 38. Nevertheless, the opposition argue this case as if the relevant *Nyquist* holdings were non-existent.

1. The basic theory of the opposition briefs is that because the Randolph Amendment stops short of imposing "undue hardship" it constitutes a "reasonable accommodation" of Free Exercise and Establishment Clause values. (See, *e.g.*, Gov't. Br. p. 20, Synagogue

[7] In *Yott* v. *North American Rockwell Corporation, et al.*, 14 F.E.P. Cases 445, 447-448 (C.D. Calif., Feb. 3, 1977), Judge Real characterized as "purely sophistry" the theory advanced by the majority in *Cummins* v. *Parker Seal Company*, 516 F.2d 544 (6 Cir., 1975), aff'd by an equally divided Court, 45 L.W. 4009, and implied here by the Government (Br. p. 33) and other adversary *amici*, that an "adequate secular purpose" can be ascribed to Section 701(j), construed as establishing a discriminatory preference, by attributing to it an intent "to put teeth in the existing prohibition of religious discrimination."

Council, p. 12). The theory is advanced by callous degradation of all interests and values but their own. Costs and practical difficulties to employers, legitimate concerns of unions and vital secular needs and desires of nonobserver employees are all contemptuously minimized. Typical is the Adventists' characterization (Br. p. 31) of the plight of senior employees forced to work on Saturdays as "end[ing] up with a schedule slightly less preferable from their point of view than the schedule they might otherwise have had." On balance, our opponents claim religious observers' needs are "reasonably" deemed to prevail over such "minimal" sacrifices.

But *Nyquist* leaves no room for "accommodations," however "reasonable," which provide "direct aid to religious activities" through taxation or expropriation of property or liberty of others. Argument designed to show the "reasonableness" of the quantum of protection afforded Sabbatarians and other religious observers against compulsion to choose between religious practices and compliance with job requirements are simply misdirected irrelevancies. Thus, in *Nyquist,* sending children to religious schools was recognized to be conscientious observance of a religious obligation; it was also undisputed that poverty acted as a severe deterrent to performance of that religious duty. Yet this Court held that measures designed to relieve the conflict by alleviating the financial hardship were inconsistent with the Establishment Clause, despite the substantial societal benefits from education of the religious observers' children at parochial schools and without stopping to inquire whether the amount of "equalizing" aid was "unduly" burdensome to other taxpayers. 413 U.S. at 782, n. 38.

Judge Real considered the "reasonable accommodation" theory in his recent decision in *Yott, supra,* 14 F.E.P. Cases, at 448. Characterizing "reasonable" relief of religious objectors from uniform job requirements as a "choice" the First Amendment does not allow, he said (*id.*):

> Government simply cannot make the choice—termed reasonable or otherwise—that [employer and union] conduct which lacks either discriminatory intent or discriminatory application can be circumscribed because [employees'] religious beliefs may oppose its implementation. Faced with such a decision government must declare its neutrality. That neutrality may result in a sacrifice from the individual who adheres sincerely to his religious beliefs. Such sacrifice is, however, self-imposed with the rewards being measured outside our temporal ken. However well-intentioned governmental action may be in an attempt to alleviate this sacrifice it cannot survive the clear command of the First Amendment and its interpretation by the Supreme Court in Committee for Public Education v. Nyquist, 413 U.S. 756 (1973).

It is argued (R. Br. pp. 7, 22; Gov't Br. pp. 23, 24; Adventists Br. pp. 16, 28, 30; A. 258) that because the cost of "accommodation" to the employer in money and inconvenience and to the Union and its constituents in denial of contract rights and benefits is small it is not "support * * * in a constitutionally significant sense" (Adventists Br. p. 39, n. 8).[8]

[8] It is also argued (Adventists Br. pp. 10, 29-31; COLPA Br. p. 23) that the cost and burden of "accommodation" should not be considered constitutionally "significant" because they may be no larger than the employer is required to incur to guard against racial or sex discrimination. The short answer is that, for reasons heretofore stated, pp. 12-15, *supra* (and not because the effect on religious observance is remote or incidental) prohibition of discrimination on religious grounds does not offend the Establishment Clause. That Clause, therefore, does not bar imposition of even heavy costs and burdens incidental to compliance with the valid statutory obligation. The same answer applies to the Adventists' argument (Br. pp. 12, 38), that benefit accruing to religious observers from accommodation is not forbidden "aid" because it does not differ from the benefit which inures to them from elimination of discrimination. One benefit is the product of partiality; the other of the "wholesome 'neutrality' of which this Court's cases speak * * *" (*Abington School Dist.* v. *Schempp,* 374 U.S. 203, 222; see also *id.* at 226). "Neutrality is what is required." *Roemer* v. *Maryland Public Works Bd.,* 426 U.S. 736, 747 (Opinion of Blackmun, J.).

This quantum argument is irreconcilable with the "No tax," however "small" principle, p. 16, *supra,* quoting *Everson* and *Nyquist.* Cost and inconvenience to the employer aside, deprivation of a senior employee's option of preferred rest days off is a tax "in kind" (*Nyquist,* 413 U.S. at 803 (Burger, C.J., dissenting)) on a scarce benefit of industrial life.

What this Court said in *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 225 (1963), is precisely applicable here:

> "Further, it is no defense to urge that the [aid to] religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.' Memorial and Remonstrance Against Religious Assessments, quoted in *Everson, supra,* at 65."

2. The premise of the argument that the accommodation requirement does not discriminatorily favor religious practices because it does not prefer those of one sect over another (R. Br. pp. 9, 16; Gov't Br. pp.

53, 54); and because it assertedly merely "equalizes" the position of Sabbatarians with that of Sunday worshippers (Synagogue Council Br. pp. 12, 14; COLPA Br. pp. 17-19) was explicitly rejected in *Nyquist, supra,* 413 U.S. at 782, n. 38, and is refuted by an unbroken line of decisions of this Court, summed up in Mr. Chief Justice Burger's characterization as "discriminatory" of legislation "favoring religious over nonreligious activities," *supra,* p. 15; U. Br. pp. 50-51.

Equally fallacious is the argument based on *Young* v. *Southwestern Savings & Loan Assn.,* 509 F.2d 140, 141 (5 Cir., 1975) (R. Br. p. 34, n. 21; Adventists Br. p. 32) that the Amendment involves no preference for religious over nonreligious activities because it protects atheists against compulsory attendance at religious services. In the first place *Nyquist* and its companion cases rejected the contention that benefits to parents who send their children to private parochial schools are valid under the Establishment Clause because the same benefits are given to parents who send their children to private non-sectarian schools.

Second, and even more significant, the facts in *Young* involve a genuine discrimination against the atheist because the employer required her to participate in a religious observance. Young's non-attendance at prayer meetings "did not affect in any way the employee's job performance" (Gov't Br. p. 39). Thus, unlike attendance at work, from which religious observers are excused, attendance at prayer meetings, albeit on Company time and property, is not work-related; in *Griggs'* terms, because irrelevant, it is an "artificial", "arbitrary" and "invidious" job requirement—and therefore truly discriminatory. See pp. 8-9, 14-15, n. 6, *supra.* There is simply no comparison between compulsory attendance at prayer meetings, a

requirement we assume the opposition would concede Government cannot constitutionally impose on its own employees (cf. *Schempp,* case, *supra*), and compulsory attendance at work on religious holidays, which the Government (by implication, Br. p. 42), admits *can* constitutionally be required of religious observers.

Finally, the relevant comparison for Establishment Clause purposes is not between religious practices which impact on work performance and irreligious or nonreligious ones which do not, but between religious needs and secular needs which impact equally on work performance. From this *relevant* viewpoint, the reality of discrimination is undeniable.[9]

3. Synagogue Council argues (Br. p. 17) that the "facilitation of religious activity" is "only indirect[ ] and minimal[ ]," because accommodation does not require the excused employee

> "to go to church on Saturday; he can sit home and watch television all day if his religious commitment permits him to do so. Moreover, * * * non-participation in an abortion or blood transfusion

[9] In *Yott* v. *North American Rockwell Corp., supra,* Judge Real illustrated the discriminatory operation of the accommodation requirement. He said (14 FEP Cases at 448):

> The excuse of an employee from union membership or the payment of union dues as a condition of employment *because* of his religious objection affords that employee a privilege not otherwise available to those employees whose religious beliefs or lack of religious beliefs provide no such excuse. For instance, employee "A" may harbor political beliefs every bit as strong and compelling as YOTT's unquestioned religious objections to union activity; yet employee "A" cannot qualify for the required accommodation of § 2000e(j) claimed by YOTT. Given the same evidence the reasonableness of the accommodation that would be required of an employer is indistinguishable between employee "A" and YOTT. The only reason ascribed by § 2000e(j) for its application to YOTT and not employee "A" is religion vs. politics.

procedure, for example, in no way *facilitates* religious activity." (Emphasis added.)

The short answer is, of course, as COLPA's Brief (p. 3, n. 3 and accompanying text) demonstrates, that the "religious commitment" is *only* to perform no menial labor on Saturday, and that nonparticipation for religious reasons in an abortion or blood transfusion procedure is likewise adherence to a religious commitment.

4. Adventists argue (Br. pp. 30-31), that if the pay for time off to vote requirement in *Day-Brite Lighting Inc.* v. *Missouri,* 342 U.S. 421 (1952), "did not constitute forbidden compelled support of the political preferences of employees," the accommodation requirement cannot be forbidden support of employees' religious practices. This Court shattered that "argument 'by analogy' " when it was recently drawn to attack, on First Amendment grounds, the public financing of election campaigns. *Buckley* v. *Valeo,* 424 U.S. 1, 92-93 (1976).[10]

[10] "We have, of course, held that the Religion Clauses—'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'—require Congress, and the States through the Fourteenth Amendment, to remain neutral in matters of religion. E.g., *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 222-226 (1963). The government may not aid one religion to the detriment of others or impose a burden on one religion that is not imposed on others, and may not even aid all religions. E.g., *Everson* v. *Board of Education,* 330 U.S. 1, 15-16 (1947). See Kurland, Of Church and State and the Supreme Court, 29 U. Chi. L. Rev. 1, 96 (1961). But *the analogy is patently inapplicable to our issue here.* Although 'Congress shall make no law . . . abridging the freedom of speech, or of the press,' Subtitle H is a congressional effort, not to abridge, restrict, or censor speech, but rather *to use public money to facilitate and enlarge* public discussion and *participation in the electoral process, goals vital to a self-governing people* [footnote omitted]. Thus, Subtitle H furthers, not abridges, pertinent First Amendment values." 424 U.S. at 92-93 (emphasis added).

Contrary to Adventists Br. p. 31, "the reasonable accommodation principle" does *not* simply "allow[ ] each religious sect to 'flourish according to the zeal of its adherents and the appeal of its dogma.' *Zorach* v. *Clauson,* 343 U.S. 306, 313 (1952)". Instead it assists some religious sects to "flourish" by enabling their "adherents" to conscript *nonadherents* to perform their work in order that the adherents may practice the religion despite their lack of sufficient "zeal" to make the sacrifices observance naturally entails.

B. The opposition argues as if the exemption cases conflict with the principles of *Nyquist.* But since they antedate *Nyquist,* this Court obviously considers them distinguishable (as does Mr. Pfeffer in his capacity as scholar, see U. Br. p. 59).

Exemption of religious observers from obligations imposed by law has been required or tolerated when the obligations impel or impede conduct conversely forbidden or required by religion or where non-exemption would injure religion as much as exemption would aid it. Exemption in these contexts poses a Religion Clause dilemma for the State as lawmaker which is absent when obstacles to religious practice derive from the exigencies of life rather than from a law. The "aid" to religious practice or observance embodied in such exemptions, therefore, does not reflect *mere* promotion of "free exercise values"; it reflects instead a far more basic consideration—restraint of Government impairment of free exercise.

For example, in *Zorach* v. *Clauson,* 343 U.S. 306, school attendance was compelled by law. Government totally regulated "the temporal and geographic environment (*Abington School District v. Schempp,*

374 U.S. at 226, n. 10), of school children during the day, preempting time available for religious instruction. Release of a portion of that time constituted an exemption, *pro tanto,* from government regulation.[11]

Wisconsin v. *Yoder,* 406 U.S. 205 (1972), similarly, involved exemption from a law-imposed education requirement. State law compelled what the Amish religion forbade.

The observations in *McGowan* v. *Maryland,* 366 U.S. 420, 459 (1961), and *Braunfeld* v. *Brown,* 366 U.S. 599, 608 (1961), approving exclusion of Sabbatarians from Sunday Closing laws again involved exemption from laws which *themselves imposed disproportionate economic hardships* upon adherents of particular religions.

The holding that Sunday Closing laws do not violate the Establishment Clause are irrelevant to Hardison's thesis, for they rest on the assumption that those laws had a valid secular purpose *only* and that assistance to religious observance was therefore "only a remote and incidental effect." *Nyquist, supra,* 413 U.S. at 784, n. 39. The same is true of the conscientious objector cases, as we showed in our opening Brief, pp. 77-79. These cases, therefore, lend no support whatever to the proposition (Gov't Br. p. 47, n. 29, see also, *id.,* 37-38) that Government may *directly* require others "to

[11] It is interesting to note that the Government's Brief, p. 43, ignores the demonstration in U. Br. p. 72, n. 43, that "a majority of the Court assumed that no hardship or burden was imposed upon those who opted against release," and persists in treating Mr. Justice Jackson's factual speculations in dissent as if they had been incorporated into the majority's decision. The premise on which the Government asserts that *Zorach* "answers [our] contention" (*id.*) is thus, quite simply, false.

adjust [their] own conduct," *i.e.,* to sacrifice property or liberty to facilitate, "religious practices of others."[12]

Finally, *Sherbert* v. *Verner,* 374 U.S. 398 (1963), involved exemption of Sabbatarians from the obligation of accepting jobs requiring work on Saturday as a condition of receiving unemployment benefits. As we demonstrated at U. Br. pp. 74-75, inclusion of Sabbatarians in the face of the various exemptions of Sunday worshippers and others made the law discriminatory, not "facially neutral", as the Government erroneously asserts (Br. p. 38), and the result may rest on that alone. But assuming, arguendo, the broadest possible interpretation, nonetheless what was at stake was a benefit provided by state law, and it was state law which compelled Sabbatarians "to choose between following the precepts of [their] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion in order to accept work, on the other hand" (*id.*). This Court decreed exemption of Sabbatarians from that law because it found that inclusion *infringed* the guarantee of *free exercise*; not merely because it would "promote

[12] In support of that proposition the Government also cites (Br. p. 43, n. 14) the sustaining by this Court in *Gallagher* v. *Crown Kosher Super Market,* 366 U.S. 617, 627 (1961), of a law "forbidding certain activities to be conducted within a set distance from a place of public worship" on Sundays. The short answer is that that law deprived no one of any property or liberty. The public has no more judicially cognizable interest in disrupting religious services by engaging in the prohibited activities on the universal day of rest than it has "a right to enter [a] cathedral and disrupt the church services * * *." *Action* v. *Gannon,* 450 F.2d 1227, 1233 (8 Cir. 1971). Inasmuch as "accommodation" does entail expropriation of property and liberty, arguments from *Gallagher* and *Action* (Adventists Br. p. 22) are unavailing.

free exercise values." See the discussion, 374 U.S. at 405-406, analogizing to *Speiser* v. *Randall,* 357 U.S. 513 (1958), a tax exemption case.

Thus, the argument by analogy—that because Government can promote "free exercise values" by exemptions such as these, it must be able to promote those values by compelling private persons discriminatorily to accommodate religious practices—is falsely bottomed.

Mr. Justice Jackson, in his dissenting opinion in *Everson* v. *Board of Education*, 330 U.S. 1, 25 (1947), appears to have forseen the distinction between *Sherbert* and this case. Government, he said, "may compensate individuals for loss of employment, but it cannot compensate them for adherence to a creed." Government may compensate Sabbatarians for loss of employment resulting from refusal to accept jobs requiring work on Saturday, but it cannot guarantee them Saturdays off from jobs in which Saturday work is required, because that is to "compensate them," or compel others to compensate them, "for adherence to a creed."

Adventists tacitly concede that exemption of religious observers from hardships they confront in life must be distinguished from exemption from hardships imposed by law for they argue (Br. pp. 9-10, 22-23), that the so-called "discriminatory" impact of work scheduling on Saturday is "largely the product of governmental action" and they justify exemption as "ameliorating the effects of governmental action." There are three answers. First, as we observed at U. Br. p. 77, the Randolph Amendment cannot be defended on the theory that it is designed to eliminate

"discrimination" between Sabbatarians and Sunday worshippers, for it applies as much to enterprises (like T.W.A. and the Postal Service) which operate on a seven day as a five day or six day basis and as much in states without and with a Sunday Closing law. Second, if elimination of discrimination between Sabbatarians and Sunday worshippers were its purpose, the Amendment would not be saved thereby, because the Equal Protection Clause cannot be invoked to sustain a program violative of the Establishment Clause. *Sloan* v. *Lemon,* 413 U.S. 825, 834 (1973). The violation of the Establishment Clause, as we have shown, inheres in the advancement and preference of religious over secular practices and causes of absence. Third, and most decisive, the requirement that employees work on a sixth day manifestly stems entirely from the business needs of particular enterprises and cannot rationally be attributed to either Sunday Closing laws or the practices of Government agencies, for Government agencies, unlike private enterprises, generally work a five, not a six, day week. The impact of Saturday work requirements on Sabbatarians, therefore, is not rationally attributable to Government, however "indirectly" (Adventists Br. p. 24), in its capacity either as law giver or employer, without obliterating the "essential dichotomy" between action which is attributable to Government and action which is not. *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, 349 (1974); *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 171-179 (1972).

C. Adversary counsel assume as a given that Section 701(j), as applied to Government in the role of employer, would face no Establishment Clause hurdle (Gov't Br. pp. 18-19, 38-44; Adventists Br. p. 41;

COLPA Br. p. 10).[13] They reason that an accommodation to "free exercise values" which Government may make in its own enterprises without violating the Establishment Clause, it must be able to compel private employers and employees to make without offending that Clause.

That conclusion would not follow from the premise even if the premise were sound, which, as we shall now show, it is not. To have validity, the argument must be bottomed on the unarticulated assumption that, *vis-a-vis* its own employees, Government is confronted with a Religion Clause dilemma, *i.e.*, subjecting religious observers to nondiscriminatory scheduling, which creates conflict between religious observance and job requirements, on the one hand, or exempting them to avoid such conflict, on the other. If in fact this dilemma existed and those *were* the only alternatives, arguably exemption might be tolerated, provided other employees were not divested of liberty or property in the process, despite the offense to Establishment Clause values. But, on that very assumption, it is self-evident that application of the Randolph Amendment to private industry must fall, for the assumed dilemma which confronts Government in dealing with its own employees simply does not exist *vis-a-vis* private employment. Government need take *no* position with respect to work schedules or job attendance requirements of religious observers in private enterprise; it could hardly be

[13] They point out, indeed, that the Civil Service Commission (undoubtedly at the instigation of the Equal Employment Opportunity Commission) has adopted such a regulation, 5 C.F.R. § 713.204(g). (Gov't Br. p. 3, n. 1; COLPA Br. p. 30) That regulation, adopted October 21, 1972, is applicable, among others, to the United States Postal Service, the Government employer involved in *Dawson* v. *Mizell*, 325 F.Supp. 511 (E.D. Va., 1971).

argued that continuation of the pre-1972 Government "hands-off" policy, p. 33 *infra*, poses any "free exercise" issue. Thus, the sole assumed justification for encroaching upon Establishment Clause values in private industry is entirely lacking.

But examination discloses that the "dilemma" assumption vis-a-vis government employees is false. In the first place, Government, as employer, has the same needs and confronts the same scheduling, production and other employee relations problems as any other employer. It is entitled to deal with those problems like any other employer, by adopting and enforcing rational, uniform, rules and policies, consistent with its interests as employer and compatible with the needs of the exclusive bargaining agent of its employees, if any. In *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 896 (1961), this Court, assuming that Brauner "could not constitutionally have been excluded from the Gun Factory * * * because she was * * * a Methodist," went on to hold: "It does not follow, however, that [she could not have been excluded] when the reason advanced for her exclusion was, as here, entirely rational and in accord with the contract with M&M." By parity of reasoning, while one cannot constitutionally be denied Government employment because of membership in the Seventh Day Adventists or the Worldwide Church of God, it does not follow that he cannot constitutionally be denied Government employment because he refuses to appear at work on days he is non-discriminatorily scheduled to do so.

"Free exercise values" do not require Government as employer, any more than they require any other employer, to create costly, burdensome and discriminatory exceptions to uniform schedule and work re-

quirements, which are relevant to operation of a Government enterprise, to facilitate religious practices of some or any employees. And because that is true, the Establishment Clause forbids Government as employer to make such discriminatory exceptions, particularly if they impact adversely on contract rights or liberties of other employees. We, therefore, disagree completely with the position taken at oral argument by petitioner's counsel in *Cummins* (Tr. pp. 45, 46), upon which COLPA relies (Br. p. 31), that "in order to avoid infringement upon free exercise [the Government] would have to make allowances." As for our opposition's argument that the adverse impact of neutral scheduling and work requirements upon Sabbatarians' employment opportunities creates a free exercise problem, the short answer is that the problem is created by the Sabbatarians' adherence to religious practices which disqualify them for certain jobs and that Government cannot constitutionally remove that disqualification by measures which violate the Establishment Clause.

The second answer is that unlike the question of taxation or exemption of religious property, where Government *is* faced with an "either-or" dilemma, accommodation of religious absences is not susceptible of solution only by creating a discriminatory exception for Sabbatarians and other observers. Accommodation can be made by rules which recognize and treat impartially religious and secular needs and causes of absence. Allowance of absence on such a non-discriminatory basis of course would not offend the Establishment Clause.

The Synagogue Council points (Br. p. 21) to the "widespread" practice "of arranging the working schedule of governmental employees who are Sabbatarians so as not to compel them to violate their religious obligations" as "strong evidence of its constitutionality." But the statutes and regulations it cites, reproduced in our *Appendix, infra,* establish that the practice is *not* to grant a *discriminatory* preference to religious observers but to treat absences for secular and for religious reasons nondiscriminatorily, on exactly the same basis. For example, New York grants government employees "personal leave" not to exceed five days a year, which is defined as leave "for personal business *including religious observance,*" p. 2a, *infra,* emphasis added.

This *actual* practice may be considered "strong evidence" that a discriminatory preference for religious absence would have been deemed violative of the Establishment Clause. At the very least, it confirms that until 1972, when the Civil Service Commission adopted the EEOC Guidelines, Governments generally, including the United States, found no just reason or legitimate justification for discriminatory preference of religious observers. *Dawson* v. *Mizell, supra.* Other than Senator Randolph's reference to diminishing attendance at the Sabbath services of certain sects, no relevant change of circumstances has been suggested.

D. 1. In contending that § 701(j) does not breach the nonentanglement requirement of the Establishment Clause, the *amici* uniformly misstate the issues which confront employers (and unions) when they are called upon to "accommodate", and Government tribunals when they are called upon to adjudicate cases under §701(j). For while the *amici* acknowledge that the sincerity of the religious claim may sometimes be called into question (a problem whose difficulty they

treat far too cavalierly), they say that the principal problem in applying § 701(j) will turn on issues of industrial affairs, and will not involve the interpretation or evaluation of religious beliefs. But the inquiry under § 701(j) is simply not so limited, as the words of the §701(j) test, "undue hardship", themselves make clear. Assuming, for the moment, that the imposition of any "hardship" on one person to facilitate the religious observance of another is constitutional, the question whether the hardship is "undue" necessarily involves evaluating the respective importance of the interests of the affected parties. Respondent, at least, recognizes this:

> "The amendment is far from rigid; rather, it takes into consideration the individual circumstances of each case and thereby is a proper balance between the rights and duties of the employer to function in the business world without discriminating and the rights and duties of an employee to freely exercise his religion and be able to compete equally in the job market." (Resp. Br. 23). See also, *id.* at 27.[14]

We know of no principled standards by which either an individual or Government can determine "the

[14] Of course, if the amendment were more "rigid" and, instead of creating a balancing test, established an absolute duty in all cases to defer to an employer religion-based claim, the seriousness of the burden on the employer and any affected employees would be aggravated. This, in turn, would compound the violation of the employer's and the employees' right not to be taxed, directly or indirectly, to support the religious observance of another person. Legislation which departs from the neutrality principle by favoring—even under the soft euphemism of relieving the burdens of—religious observance, is inevitably impaled on one of the horns of this dilemma.

proper balance". It is inherent in their nature that religious values and economic values are not interchangeable; there is no common currency or other single value system into which they can be transmuted to make comparison possible.[15]

The difficulty is particularly severe if §701(j) is construed to require the rights of some employees to yield to the interests of other employees to engage in religious observance. How is it to be determined whether an employee's interest in not working on his Sabbath is entitled to greater respect or protection than a fellow employee's interest in sharing the company of his working spouse on one of the two days of the weekend? Is the choice to which the Sabbatarian is put if he must work on Saturday or lose his job more onerous than that of the single parent who cannot work on Saturday because he or she has no one to take care of the children? Does the obligation of one employee to accommodate the religious observance of another include paying for child care so that the parent can perform work which the Sabbatarian refuses?

[15] To be sure, there are cases in which the courts have balanced an individual's right to engage in conduct in the exercise of religion against society's interests in preventing such conduct. The difficulty and sensitivity in those cases should itself serve as a caution. But grappling with the problem, no matter how imperfectly, is unavoidable unless the demands of religious observance are to be exalted above all other interests, an alternative which this society cannot tolerate, or that they be subordinated entirely, an alternative which would nullify the Free Exercise Clause. But § 701(j) imposes an obligation to balance where none would exist if Congress had respected this Court's consistent holding "that the [Establishment] clause withdrew all legislative power respecting religious belief or the expression thereof." *Abington School District* v. *Schempp*, 374 U.S. at 222.

Moreover, § 701(j) makes examination of the tenets of the religion unavoidable. Respondent says

> "An individual's religious beliefs and practices must give way, if he wishes to remain employed, if an employer can demonstrate that these practices are unreasonable or that the practice places an undue hardship on the employer." (R. Br. p. 38).

And one *amicus* admits that "Section 701(j) obligates an employee to cooperate with his employer's efforts to make a 'reasonable accommodation' " (COLPA Br. 24). Whether an accommodation is "reasonable" may well depend on the importance of a particular observance in the mosaic of an employee's particular set of religious beliefs. There is in many, if not all, faiths a hierarchy among religious observances. For example, in the Jewish religion the New Year and Yom Kippur are known as the high holy days and their observance is regarded as a more strict duty than the observance of lesser holidays (like Purim) in the calendar. And there are also differences among adherents of particular faith as to the importance which they individually attach to particular observances.

The hypothetical example at Adventists Br. pp. 33-34, though apparently constructed to be trivial, is suggestive. To some observers, a pilgrimage to Mecca, Jerusalem or some other holy place is a religious imperative; to others, it is not a command but a highly valued religious experience. Are both equally entitled to accommodation? If so, the individual judgments of religious observers would be elevated above the interests of other employees. If not, what calipers are sufficiently sensitive to measure the degree of the observer's need? Finally, contrary to the Adventists' implication, to some, though not to all, it *does* matter when a pilgrimage is made. The benediction "next year in Jerusalem" symbolizes the importance which some Jews attach to being in the Holy City at the time of the Passover.

2. While Adventists on the one hand claim (Br. 45), that it is "highly doubtful" that the resentment of employees discriminated against in favor or religious observers will "lead to potential divisiveness in the relevant social and political sense," they assert on the other that "accommodation" will remove "a much more significant source of divisiveness" (*id.* p. 46) the economic burdens religious observers otherwise bear. This court answered that proposition in *Nyquist* by referring to the wisdom of Mr. Justice Black's prophecy that concession to demands to ease the economic burden of religious observers lead not to quiescence but to further demands. 413 U.S. at 784-785.

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment below should be reversed with direction to dismiss the complaint.

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APPENDIX

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Statutes and Regulations cited in Synagogue Council Brief, p. 21, as establishing "the practice of arranging the working schedule of governmental employees who are Sabbatarians so as not to compel them to violate their religious obligations."

Conn. Gen. Stat. § 5-250(c):

> (c) In addition to annual vacation, each appointing authority shall grant to each full-time permanent employee in the state service *three days* of personal leave of absence with pay in each calendar year. *Personal leave of absence shall be for the purpose of conducting private affairs, including observance of religious holidays,* and shall not be deducted from vacation or sick leave credits. Personal leave of absence days not taken in a calendar year shall not be accumulated. (Emphasis added)

Fl. Stat. Ann. § 231.40(1)(c)(sic) should be 231.40(1)(b):

> (b) A school board may establish policies and prescribe standards to permit a member of the instructional staff to be absent *4 days* each school year *for personal reasons.* However, such absences for personal reasons shall be charged only to accrued sick leave, and leave for personal reasons shall be noncumulative. (Emphasis added)

In 1970, the above words "personal reasons" were substituted for "religious holidays".

N.J. Rev. Stat. 11:14-8:

> Administrative leave of absence may be used only at a time convenient to and approved in advance by the appointing authority; provided, however, that administrative leave of absence allowed for a religious

observance shall be granted on the days and hours required insofar as the same may be granted without interference with the proper conduct of government functions.

This statute should be read in conjunction with N.J. Rev. Stat. 11:14-6:

> In addition to leaves of absence authorized pursuant to chapter 14 of Title 11, Civil Service, and supplements thereto, all employees in the classified service of the State service and those employees of Rutgers, The State University, Newark College of Engineering, and the College of Medicine and Dentistry of New Jersey whose counterparts in the New Jersey State colleges are or would be in the classified service shall be entitled to administrative leave of absence for not less than 3 days per calendar year for *personal business, including religious observances.* Administrative leave shall not be charged against accumulative vacation leave or overtime credits. (Emphasis added)

N.Y. Civ. Serv. Rules and Regs. § 21.6:

> 21.6 Personal leave. (a) Personal leave is leave with pay *for personal business including religious observance,* without charge against accumulated vacation or overtime credits. Employees shall be entitled to personal leave not exceeding a total of five days in a year. (Emphasis added)

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In the Supreme Court of the United States

OCTOBER TERM, 1976

TRANS WORLD AIRLINES, INC., PETITIONER

v.

LARRY G. HARDISON, ET AL.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, ET AL., PETITIONERS

v.

LARRY G. HARDISON, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1126

TRANS WORLD AIRLINES, INC., PETITIONER

v.

LARRY G. HARDISON, ET AL.

No. 75-1385

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, ET AL., PETITIONERS

v.

LARRY G. HARDISON, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

QUESTIONS PRESENTED

Title VII of the Civil Rights Act of 1964 and Equal Employment Opportunity Commission Guidelines prohibit the discharge of an employee because of his religious observance or practice, unless the employer is unable reasonably to accommodate the employee's religious observance or practice without undue hard-

ship to the conduct of the employer's business. Petitioner Trans World Airlines, Inc., discharged respondent Larry G. Hardison because of his religious practice of refraining from work on Saturdays. The questions presented are:

1. Whether Trans World Airlines demonstrated an inability reasonably to accommodate Hardison's religious practice without undue hardship on the conduct of its business.

2. Whether the statute and guidelines violate the Establishment Clause of the First Amendment.

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Pursuant to Title VII of the Civil Rights Act of 1964, the Attorney General and the Equal Employment Opportunity Commission have responsibility for enforcement of federal laws providing for equal employment opportunity. Although this action was brought by a private plaintiff, the issues raised are similar to those arising in suits brought by the government. The resolution of the issues presented in this case will directly affect the government's enforcement responsibilities.

The Attorney General also has responsibility for enforcement of a variety of other federal laws proscribing discrimination on account of religion, including those requiring nondiscrimination in housing (42 U.S.C. 3601 *et seq.*), public accommodations (42 U.S.C. 2000a *et seq.*), public facilities (42 U.S.C. 2000b *et seq.*), public education (42 U.S.C. 2000c–6),

and certain other federally protected activities (18 U.S.C. 245).[1]

Pursuant to this interest, the government participated as *amicus curiae* in *Dewey* v. *Reynolds Metals Co.*, 402 U.S. 689, affirming by an equally divided Court 429 F.2d 324 (C.A. 6), and *Parker Seal Co.* v. *Cummins*, No. 75-478, decided November 2, 1976, affirming by an equally divided Court 516 F.2d 544 (C.A. 6), which also involved the validity of an employee's discharge because of his religious observance or practice.

STATEMENT

1. Petitioner Trans World Airlines, Inc. ("TWA"), is a common carrier engaged in the interstate and international transportation of passengers, cargo and mail (A. 23, 57). It employs approximately 37,000 persons at approximately 100 locations (A. 23, 59).

The company operates a maintenance and overhaul base at the Kansas City International Airport in Kansas City, Missouri (A. 23, 59). The base repairs, maintains, and overhauls aircraft and aircraft engines for

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[1] In addition, Civil Service Commission Regulations on Equal Opportunity require federal agencies to make reasonable accommodations to the religious needs of applicants and employees, including those who observe the Sabbath on days other than Sunday, when accommodation can be made without undue hardship on the business of the agency. See 5 C.F.R. 713.204(g). Guidelines issued pursuant to Executive Order 11246 by the Office of Federal Contract Compliance Programs of the Department of Labor similarly require contractors and subcontractors with the federal government, and contractors and subcontractors on federally-assisted construction contracts, to make reasonable accommodations to the religious observances and practices of employees and prospective employees. 41 C.F.R. 60–50.3.

TWA and approximately 30 other airlines (A. 23, 148-149). The facility is TWA's only overhaul base and its main major repair station (A. 149), and operates twenty-four hours a day, 365 days a year (A. 23, 102, 149).

Mechanics and related employees working for TWA are governed by a collective bargaining agreement between TWA and petitioner International Association of Machinists and Aerospace Workers (A. 22, 210-217). In Kansas City, the agreement is administered by petitioner Local 1650 at the local level and by petitioner District 142 at the district level (A. 22). The agreement provides in part that "[t]he principle of seniority shall apply * * * in all reductions or increases of force, preference of shift assignment, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement" and that "seniority shall apply in selection of shifts and days off within a classification within a department." The agreement also provides that "[e]xcept in an emergency, an employee will not be required to work overtime against his wishes" (A. 214, 216).

Respondent Larry G. Hardison began work for TWA on June 5, 1967, as a stores clerk in the Stores Department at Building No. 1 at the Kansas City overhaul base (A. 22, 23, 101). Building No. 1 is used for the overhaul of air frames. The Stores Department is responsible for delivering parts and materials to TWA's mechanics (A. 115-116, 149-150). As a stores clerk, Hardison's principal function was to deliver parts and materials to mechanics at the base (A. 213). Hardison

worked the "twilight shift" from 3:30 p.m. to 11:00 p.m., Monday through Friday (A. 66).

Hardison first became interested in the Worldwide Church of God in the spring of 1968 (A. 66, 72-73, 80). Members of this church refrain from working from sundown Friday to sundown Saturday and on several annual holy days (A. 22, 25, 67, 100-101). Hardison began to follow the precepts of the church in late September or early October 1968 and was baptized in February 1969 (A. 66, 73-74).

On April 25, 1968, shortly after he became interested in the church, Hardison wrote to Everett Kussmann, Manager of Store Systems at the overhaul base, requesting an appointment to discuss "a change in weekly days off" for religious reasons (A. 27-28). Kussmann met with Hardison and learned of Hardison's emerging religious beliefs concerning work on the church's Sabbath and holy days (A. 79, 117). Kussmann then wrote to Burns Prater, a TWA supervisor for the Stores Department, that the union steward should attempt to swap Hardison's days off, to excuse Hardison's absences on Worldwide Church of God holy days if Hardison "works the Christian holiday[s] when requested," and that Prater should attempt to find Hardison another job not involving Saturday work (A. 28, 118-122). Prater responded on May 7, 1968:

> I haven't made any headway. His time off and day off requirement[s] are too difficult to handle. I understand that no one would swap days off with him [A. 28, 122].

No further action was taken by TWA in response to Hardison's request for time off. From May to September 1968, Hardison continued to work on Friday evenings and worked some voluntary overtime shifts on Saturdays (A. 73-74).

On September 6, 1968, Hardison advised Kussmann and James Tinder, his union steward, that his religious beliefs were becoming firmer and that his work schedule was going to be a problem (A. 73, 79-81, 108-109). He told Kussmann and Tinder that he had put in a bid for a different shift so that he could observe his Sabbath and that he would try to work out his problem within the seniority system (A. 80). By so bidding, Hardison obtained a position as stores clerk on the "graveyard shift" (11:00 p.m. to 7:00 a.m.) of the Stores Stockroom Section at Building No. 1 (A. 66-67, 73).

Since his work week on this shift began at 11:00 p.m. on Sunday and ended at 7:00 a.m. on Friday, he was able to observe his Sabbath without difficulty (A. 67). By letter of October 4, 1968, Hardison informed Kussmann that he had transferred to the graveyard shift to be able to observe his Sabbath and that he would soon enter the church. Kussmann requested and received from Hardison a list of Hardison's holy days for 1969 (A. 29-30, 74, 124).

On December 2, 1968, Hardison voluntarily transferred from the graveyard shift at the Stores Stockroom Section in Building 1 to a position on the day shift (7:00 a.m. to 3:30 p.m.) of the Stores Progress Section in Building 2 because he had recently married and believed that day-shift work would be more compatible with married life (A. 23, 67-68, 103). His job in

Building 2 was to drive a train continuously from shop to shop at the overhaul base to pick up and deliver materials (A. 75). Because the train ran on weekdays only (A. 76, 133), Hardison was able to observe his Sabbath (A. 68, 69).

The Stores Stockroom Section at Building 1 and the Stores Progress Section at Building 2 had separate seniority lists (A. 23-24, 75, 104). Hardison's seniority had placed him in the middle of the seniority list for Building 1 but next to last on the list when he transferred to Building 2 (A. 24, 68, 75, 103-104).

The only stores clerk in Stores Progress with less seniority than Hardison was Bill Wyatt, whose vacation was scheduled in March 1969 (A. 7). By operation of seniority, Hardison was scheduled to replace Wyatt and thus to work on Saturday, March 8 (A. 24). He was the only stores clerk in his section scheduled to work that day (A. 125, 133, 156). TWA employed more than 200 other stores clerks who, seniority aside, were qualified to substitute for Wyatt on Saturdays (A. 133-134, 140, 152-153, 155-156).

Kussmann learned that Hardison was scheduled to work on March 8 and scheduled a meeting for March 6 with him and his union steward, James Tinder (A. 31, 69, 72, 76, 109). Several means of accommodation were discussed at the meeting. Kussmann was unwilling simply to give Hardison the Saturday off since that would "deprive me of coverage on the day that I needed a man to work" (A. 127-128, 146). Kussmann was willing to agree to Hardison's changing shifts within his section, but Tinder would agree to this only if it could be accomplished within the seniority provisions of the

collective bargaining agreement, *i.e.*, only if the shift sought by Hardison was put up for bid and no one senior to Hardison wished to take it (A. 70, 77, 84).

Hardison mentioned that he knew of a man on the graveyard shift of his section who disliked working on that shift and stated that it "would be great" if he could change shifts with him (A. 70, 83). Tinder stated that since Hardison had less seniority than this man, he could not "bump" into his position (A. 70, 84, 110).

Hardison also suggested a transfer to another section, preferably back to Building No. 1, where he had enough seniority to have weekends off, at least on the graveyard shift (A. 70-71, 77, 110). Tinder objected to this proposal also, because of seniority and because of a requirement in the union's constitution that Hardison work at least six months in his present position (A. 70-71, 84, 110).

Hardison also offered to work six days per week, without overtime pay, to be able to have his Sabbath off (A. 71). Tinder opposed this because the collective bargaining agreement required the payment of overtime wages for hours worked in excess of 40 per week (A. 71). The meeting ended without a resolution of Hardison's problem.

That same day, Hardison also met with his immediate supervisor, John Nicholson, who refused Hardison's request to be excused on March 8 for "personal business" (A. 31, 33). On March 8 Hardison called in to the "day storekeeper" and asked for the day off for personal reasons. When this request was denied, Hardison failed to report for work (A. 31-32, 112).

Hardison was also scheduled to work the two following Saturdays, March 15 and 22, 1969 (A. 31-33, 69). A few days before March 15, he asked R. C. Stewart, then substituting as foreman for Nicholson, if he could be excused from work on March 15. This request was refused, but Hardison did not report for work that day (A. 31, 32).

On March 21 Hardison met with W. J. Butcher, Supervisor of Stores Planning and Control, and steward James Tinder concerning his absences (A. 32, 72). As a result of the meeting, Butcher wrote Hardison that a discharge hearing would be scheduled if he failed to report for work on Saturday, March 22, without an acceptable justification (A. 32-33). Respondent failed to report for work on March 22 (A. 31, 34).[2]

After being notified that a discharge hearing had been scheduled, Hardison met with members of the Union Grievance Committee (A. 34, 77-78, 168-172). The Committee decided to argue that discharge was too severe a penalty and to seek reversal of any adverse decision at a higher level (A. 168, 169). The possibility of the union's waiving the seniority requirements was not discussed (A. 93). Hardison told the members of the Grievance Committee to use their best judgment as to the conduct of his defense (A. 169, 172).

After the meeting, Hardison changed to the "twilight shift" (3:30 p.m. to 11:00 p.m.) of his section in an effort to resolve his problem (A. 130), but at sundown on Friday, March 28, before his shift was over, Hardison left work (A. 129, 130, 171).

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[2] As a result of Hardison's absences on March 8, 15 and 22, employees from other sections were required to work in his place (A. 125, 162).

The discharge hearing was held on March 31, 1969 (A. 34, 173). Hardison was present but did not testify (A. 94, 173). The union argued, on Hardison's behalf, that TWA had committed certain procedural errors that made any discipline improper and that, in any event, discharge was too severe a penalty (A. 34).

Hardison was found insubordinate for refusing to work on March 8, 15, and 22, 1969, and his employment was terminated on April 2, 1969 (A. 34-35, 94, 95). Union officials thereafter attempted to reach him to pursue the matter further, but without success (A. 35-36, 179, 181-182). Hardison did not file a grievance with the Union Grievance Committee against either TWA or the union (A. 78, 93, 132).

At no time during the discussions concerning the conflict between Hardison's religion and his work schedule did any TWA or union representative raise the question whether the Civil Rights Act might be applicable, and there was no evidence that any person involved in the discussions was aware of its possible pertinence (Tr. 461).

2. Hardison filed a complaint of religious discrimination with the Equal Employment Opportunity Commission in August 1969 (A. 7-9, 37). After complying with the appropriate administrative procedures, the Commission gave Hardison a "Notice of Right to Sue Letter" on January 11, 1972 (A. 5, 17). He filed this action in the United States District Court for the Western District of Missouri on February 10, 1972 (A. 3-9).

The complaint charged that TWA violated Title VII of the Civil Rights Act of 1964, 78 Stat. 241, 253, as

amended, 42 U.S.C. 2000e *et seq.*, by discharging Hardison on the basis of his religion (A. 4). The complaint further alleged that petitioner unions violated Title VII by "failing to negotiate, assist, or correct the discriminatory policies of defendant Trans World Airlines, Inc.," and by "cooperat[ing with], act[ing] in concert [with,] and assist[ing]" TWA in its discharge of Hardison (A. 4-5). Hardison sought permanent injunctions against TWA and the unions, an award of all lost wages and benefits, and attorney's fees (A. 5-6).

3. In its memorandum and order of May 15, 1974 (A. 183-209), the district court found for TWA and the union. The court ruled that a 1967 EEOC Guideline, 29 C.F.R. 1605.1, see footnote 4, *infra,* requiring reasonable accommodation to employees' religious practices, was consistent with Title VII of the 1964 Civil Rights Act (A. 197-201), that it did not violate the Establishment Clause of the First Amendment (A. 201-202), and that it applied to the union as well as to TWA (A. 188-189). The court concluded, however, that "to require the union to ignore seniority in every case in which an employee with lesser seniority can observe his Sabbath only by changing shifts with a more senior employee would work an undue hardship on the union" (A. 189), that 42 U.S.C. 2000e-2(h)[3] "if not absolutely

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[3] That section provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system • • • provided that such differences are not the result of an intention to discriminate because of • • • religion • • •.

controlling, at least indicates that Congress did not intend that unions or employers be required to take actions that could impinge upon bona fide seniority systems" (A. 191), and that the facts did not sustain respondent's charge "that the unions failed to properly process his grievance" (A. 193).

The court held that "TWA's actions with respect to working out [Hardison's] religious observance was [sic] a reasonable accommodation by TWA and that any further action by TWA would have worked an undue hardship on the conduct of its business" (A. 205). The court ruled that TWA had "take[n] appropriate action to accommodate" by holding "several meetings with [Hardison] in which it attempted to find a solution to [his] problems", "accommodat[ing] [his] observance of his special religious holidays", "authoriz[ing] the union steward to search for someone who would swap shifts", and "attempt[ing] to work out [his] problems in ways that had proved successful in similar cases" (A. 207-208).

In concluding that "further accommodation by TWA would have worked an undue hardship on the conduct of its business," the court stated (A. 208):

> TWA had two choices for further accommodation: (1) to simply allow [Hardison] to take his time off and attempt to replace him; or (2) to force another employee to change shifts.
>
> * * * To replace him with an employee from another area would leave that employee's work crew short. To replace him with an employee who

> was not regularly scheduled to work at that time would have caused TWA to pay premium wages. Both of these solutions would have created an undue burden on the conduct of TWA's business.

The court also ruled that "it would have been an undue hardship for TWA to have changed [Hardison's] shift in violation of the seniority provision of the labor-management contract" (A. 209). Accordingly it ordered that judgment be entered in favor of all the petitioners (A. 209).

4. The court of appeals affirmed the judgment in favor of the unions, but reversed the judgment in favor of TWA and remanded the case for the determination of appropriate relief (A. 246-266). The court agreed with the district court that EEOC Guideline 29 C.F.R. 1605.1 was consistent with Title VII (A. 253-254) and the Establishment Clause (A. 264-266), and that it applied to the unions as well as to TWA (A. 262).

The court observed that Hardison had made "a consistent effort * * * to acquaint TWA with his religious conversion and the effect of that commitment upon his ability to work during his Sabbath period and certain other religious holidays" (A. 254-255). It noted that Hardison "was willing to work long weeks or short weeks provided his religious obligation to abstain from work on his Sabbath could be met" and that "[h]e even transferred to the twilight shift in order to minimize the impact of his absence on the company" (A. 255).

The court ruled that TWA could have reasonably

accommodated Hardison without undue hardship in several ways. First, "[w]ithin the framework of the collective bargaining agreement, TWA could have permitted Hardison to work a four-day week" (A. 256). Another alternative "within the framework of the collective bargaining agreement was for TWA to fill Hardison's Sabbath shift from other available personnel. This could be accomplished by holding a worker over from the last shift, calling a worker in early, or, more logically, assigning a worker from the pool of 200 employees qualified to do the work" (A. 257-258). A third alternative, the court ruled, was "a swap between Hardison and another employee, either for another shift or for the Sabbath days" (A. 259; footnote omitted).

The court of appeals observed that it was not required to determine "[t]he proper relationship between a bona fide seniority system and the requirement of reasonable accommodation" (A. 259), because "TWA did not seek and the union therefore did not refuse to entertain a possible variance [to the collective bargaining agreement]" (A. 260-261; footnote omitted). "TWA did not even seek to find volunteers within the seniority system. It left that task to the union steward, who likewise did nothing" (A. 261).

The court noted that the district court's conclusions about the liability of the union "are not directly challenged upon appeal[;] the briefs and oral argument are directed to the breach of duty by TWA" (A. 263). Accordingly, the court ruled that it was "not required to reach the substantive correctness of such conclusions" (A. 263).

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 703(a)(1) of the Civil Rights Act of 1964, 78 Stat. 255, 42 U.S.C. 2000e-2(a)(1), provides that it is an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * religion * * *." Section 701(j) of that Act, as added by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. (Supp. V) 2000e(j), defines "religion" to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." The Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Religion, in effect since 1967, embody a similar standard.[4]

The parties do not dispute that TWA discharged Hardison because of his refusal to work on Saturdays and that his refusal to work on Saturdays is a sincere "religious observance and practice" within the meaning of Section 701(j) of the Act.[5] Whether TWA com-

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[4] The Guidelines impose on an employer the obligation "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business." 29 C.F.R. 1605.1(b).

[5] Hardison was discharged in April 1969; he filed the complaint

mitted an unlawful employment practice—that is, whether it discharged Hardison because of his "religion"—thus turns on whether the company demonstrated that it was unable reasonably to accommodate

in this case on February 10, 1972. Both these events preceded the enactment of Section 701(j) on March 24, 1972. TWA contends that "no duty to accommodate ever existed in this case," because Section 701(j) "can only be given a prospective application" (Br. 23 n. 9). However, neither of the petitions for certiorari specifically presented the question whether the reasonable accommodation requirement, if constitutional, applied in this case, and we doubt that the question is fairly comprised in those that were presented in the petitions. See Rule 23(1)(c) of the Rules of this Court.

In any event, the 1967 EEOC Guideline requiring reasonable accommodation was in effect when Hardison was discharged. The duty to accommodate defined in the Guideline is implicit in Title VII's basic prohibition of discrimination against employees on account of religion. See, *e.g.*, *Cummins* v. *Parker Seal Co.*, 516 F. 2d 544, 547 (C.A. 6), affirmed by an equally divided Court, No. 75–478, decided November 2, 1976; *Reid* v. *Memphis Publishing Co.*, 468 F. 2d 346, 351 (C.A. 6); *Riley* v. *Bendix Corp.*, 464 F. 2d 1113, 1116–1117 (C.A. 5). But see *Reid* v. *Memphis Publishing Co.*, 521 F. 2d 512, 519–520 (C.A. 6); *Dewey* v. *Reynolds Metals Co.*, 429 F. 2d 324, 331 n. 1, 334, 335 (C.A. 6), affirmed by an equally divided Court, 402 U.S. 689; *Kettell* v. *Johnson & Johnson*, 337 F. Supp. 892, 895 (E.D. Ark.). TWA was therefore under an obligation reasonably to accommodate Hardison's religious practice.

Moreover, "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Cort* v. *Ash*, 422 U.S. 66, 77, quoting *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711. See also *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 281–283; *United States* v. *The Schooner Peggy*, 1 Cranch 103, 110. There is no "manifest injustice" in applying Section 701(j) in this case because the statute merely codified the pre-existing EEOC Guideline. Nor does the statute or its legislative history indicate that Section 701(j) should not be applied in cases such as this. In these circumstances, the constitutionality and application of both Section 701(j) and the Guideline are properly before the Court.

Hardison's Saturday absences without undue hardship in the conduct of its business.

This issue was, in our view, correctly resolved by the court of appeals, which concluded, after a thorough review of the record, that TWA did not make the required showing and that its discharge of Hardison therefore violated the Act's prohibition against religious discrimination.

TWA could have reasonably accommodated respondent's religious practice without violating the collective bargaining agreement in several ways. It could have simply excused him without pay from working those few times per year when he would be required to work Saturdays. It could also have allowed him to take a day's leave. It could have sought volunteers willing to substitute for him on Saturdays, or to exchange shifts with him on a permanent basis, from among more than 200 TWA employees capable of performing his functions. It could have enlisted the aid of the Union Relief Committee. TWA took none of these actions. None would have violated the collective bargaining agreement. None would have caused it undue hardship.

Even if accommodating Hardison's religious practice would have required TWA to breach the seniority provisions of the collective bargaining agreement—and we believe it would not—that would not justify TWA's failure to make a reasonable accommodation. Such provisions do not confer indefeasible rights upon employees. Rather, employee expectations arising from such provisions may be modified by statutes such as Title VII that further the public interest. TWA has not shown that granting Hardison a variance from the

collective bargaining agreement would have created an undue hardship upon the operation of its business.

II

It follows that Hardison is entitled to appropriate relief under the Act, unless, as TWA and the Unions alternatively argue, the Act and the EEOC Guidelines, as interpreted by the court of appeals, violate the Establishment Clause of the First Amendment by imposing on the company an obligation reasonably to accommodate an employee's religious observance or practice.

A. If Congress may validly proscribe sophisticated as well as obvious means of religiously-discriminatory employment practices by private employers, and if, as this Court has held, Title VII is directed to the consequences and not merely the motivation of employment practices, then it follows that the reasonable accommodation requirement does not violate the Establishment Clause. For it does no more than state a standard by which to determine whether, in a particular case, an employment practice with religiously-discriminatory consequences is justified by substantial business need. An employer's obligation reasonably to accommodate his employees' religious needs derives from his basic obligation to avoid religious discrimination in employment.

B. This Court's Establishment Clause decisions make clear that a government employer could properly make reasonable accommodations to those of its employees whose religious beliefs or observances conflict with normal work schedules, even if the schedules of other

employees might have to be adjusted as a consequence. That would reflect a permissible "neutrality in the face of religious differences" and would not "serve to abridge any other person's religious liberties" (*Sherbert* v. *Verner*, 374 U.S. 398, 409). It is not an establishment of religion for public institutions to make "adjustments of their schedules to accommodate the religious needs of the people" (*Zorach* v. *Clauson*, 343 U.S. 306, 315).

It is no more an establishment of religion for the government to require private employers to do the same thing. In neither case is there any departure from the principle of neutrality. Congress may validly seek to accommodate free exercise values by eliminating unnecessary burdens on the practice of religion and avoidable clashes with the dictates of conscience.

C. The reasonable accommodation requirement satisfies the tripartite test devised by this Court for determining whether a challenged law violates the Establishment Clause: it reflects a secular purpose, it has a primary effect that neither advances nor inhibits religion, and it avoids excessive government entanglement with religion.

The purpose and effect of the reasonable accommodation requirement are the same as those of Title VII as a whole—"to achieve equality of employment opportunities" and to "remov[e] * * * unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of * * * impermissible" criteria. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429, 431. Congress has properly determined that an individual's religion, as well as his race, nationality,

and sex, should not affect his employment opportunities except in the rare instance when it significantly affects his job qualifications.

The reasonable accommodation requirement represents a permissible legislative effort—secular in purpose and effect—to identify the circumstances in which it may fairly be said that an individual's religious practices are sufficiently relevant to his job qualifications that they may properly be taken into account in connection with an employment practice. The requirement's primary effect neither advances nor inhibits religion; rather, it removes an artificial barrier to equal employment opportunity by making religion an "irrelevant" employment criterion (*Griggs, supra,* 401 U.S. at 436), except to the limited extent that a person's religious practice significantly and demonstrably affects the employer's business.

The requirement entails no substantial government entanglement with religion. The central factual inquiry under the statute—whether the employer can reasonably accommodate an employee's religious practice without undue hardship—implicates industrial, not religious, considerations, and any unavoidable "entanglement" that may occasionally result when a religion's practices or an employee's sincerity is put in issue is likely to be minimal and is essentially no different from that mandated in another context by this Court's decision in *Sherbert* v. *Verner, supra.*

In sum, the reasonable accommodation requirement itself represents a reasonable accommodation of the values embodied in the Free Exercise and Establishment Clauses. Although the legislative solution is not compelled by either clause, neither is it forbidden.

ARGUMENT

I

NEITHER TWA NOR THE UNION HAS DEMONSTRATED THAT IT IS UNABLE REASONABLY TO ACCOMMODATE HARDISON'S RELIGIOUS PRACTICE WITHOUT UNDUE HARDSHIP ON THE CONDUCT OF ITS BUSINESS

Upon a full review of the record, the court of appeals reversed the district court's conclusion that TWA had made a reasonable effort to accommodate Hardison's religious practice and that further effort to accommodate would have created undue hardship on the conduct of its business. The court of appeals relied "heavily" on the findings of the district court (A. 247) but concluded that, even within the framework of the collective bargaining agreement, TWA could have taken further steps to accommodate his religious practices without incurring undue hardship. This conclusion is correct.[6]

Moreover, while the duty of reasonable accommodation does not, in our view, require an employer to im-

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[6] Both the district court (A. 186–188) and the court of appeals (A. 261–262) held that the union no less than the employer has a duty to accommodate; as the court of appeals said, "[t]he union may be held liable if it purposefully acts or refuses to act in a manner which prevents or obstructs a reasonable accommodation by the employer so as to cause the employer to discriminate" (A. 262). Although the union argues that this duty does not obligate it to override seniority rights, and that any construction of the statute to require such a result would violate the Establishment Clause, it does not challenge the holding below that the union has a duty to accommodate.

plement an accommodation that violates the terms of a bona fide collective bargaining agreement if an accommodation that does not do so is possible, neither can the employer rely solely on the collective bargaining agreement in refusing to accommodate. To reject as *per se* unreasonable those accommodations which conflict with the collective bargaining agreement would give a private agreement a status superior to the federal law. Therefore, if a reasonable accommodation without undue hardship could not be reached in this case within the confines of the seniority system, Title VII obliges the parties to adjust those rules in an effort to reach such an accommodation.

Perhaps, in some future case, seniority rules would need to be bent so much that the hardship could properly be called "undue." But this is not that case. Since Hardison was on a Monday-to-Friday day shift, he would normally be required to work only a few Saturdays per year, on those occasions when employee Wyatt was sick or on vacation, or when emergencies occurred. Moreover, Hardison was willing to transfer back to his former unit, where his higher standing on the seniority ladder would have reduced even further his vulnerability to substitute for others on his Sabbath. But the opposition of TWA and the union to each of several possible solutions prevented an accommodation and led to Hardison's discharge.

A. ACCOMMODATIONS WITHIN THE FRAMEWORK OF THE COLLECTIVE BARGAINING AGREEMENT WERE REASONABLY AVAILABLE.

Within the framework of the collective bargaining agreement, TWA could have accommodated Hardison's

religious beliefs by simply allowing him to take a day's leave or excusing him, without pay, from Saturday work. The union had no objection to this solution (A. 115), but TWA's Kussmann objected, stating that such an accommodation would mean "usurping seniority in another section that would have to cover * * * or I would have to depend on overtime, which could not be compulsory in this case, and I might not get it" (A. 128). But it is not self-evident that moving to Hardison's slot an employee who would normally work Saturday in another section would usurp anyone's seniority rights or necessarily cost TWA any overtime. While such a move would create a temporary vacancy elsewhere, there was no showing below that such a vacancy could not be tolerated for an occasional Saturday.

With respect to "compulsory" overtime, there is no reason to believe that TWA would have been any less able to call in an employee for Hardison's absence due to religious observance than it would have been had Hardison been absent due to illness. The problem seems to have been not one of obtaining a worker, but of paying him overtime. But, as the court of appeals correctly recognized, "[t]he regulation does not preclude some cost to the employer anymore than it precludes some degree of inconvenience to effect a reasonable accommodation" (A. 258). See also *Ward* v. *Allegheny Ludlum Steel Corp.*, 397 F. Supp. 375, 377 (W.D. Pa.). Since a substitute for Hardison would be required only a few times per year, the additional costs incurred by TWA for overtime wages, if any, would not be great.

Without violating the collective bargaining agree-

ment, the company also could have avoided any perceived problems of "compulsory" overtime by seeking volunteers from within the Stores Department. There were more than 200 stores clerks besides Hardison capable of working in Wyatt's place, most of whom were not ordinarily scheduled to work Saturdays (A. 155-156). Given this number of qualified stores clerks, it is reasonable to suppose that one volunteer might well be forthcoming on each of the few times per year that accommodation would be required.

Indeed, in at least one respect it is ordinary company policy to seek out volunteers to work certain shifts. In arranging for sufficient personnel to work on the "contract holidays" (A. 216), such as Christmas, the company would notify the union steward of the number of persons required to work on each shift. The steward would then ask for volunteers to fill the positions. Only if there were not enough volunteers would the steward attempt to fill the positions by reverse seniority (A. 137-139). Given such flexibility of operation, TWA "cannot be heard to plead that its hands are tied by a seniority agreement." *Shaffield* v. *Northrop Worldwide Aircraft Services, Inc.*, 373 F. Supp. 937, 942 (M.D. Ala.).

Furthermore, TWA similarly made no effort to bring Hardison's situation to the attention of the Union Relief Committee, "an informal organization of union members through which the union and TWA were normally able to avoid confrontations over seniority variances in special situations" (A. 261). The Committee in the past had arranged temporary transfers outside strict seniority requirements (A. 144). At the

time of trial, the Committee had requested and obtained special relief for another TWA employee (A. 131). The Committee, in at least one instance, had even arranged a permanent transfer out of seniority (A. 144). But even temporary relief through the Committee may have enabled Hardison to keep his job, for as he accrued additional seniority, he would likely have been able, through bidding rights, to avoid work on his Sabbath.

B. ACCOMMODATIONS REQUIRING AN ADJUSTMENT IN THE SENIORITY SYSTEM WERE ALSO REASONABLY AVAILABLE.

Certain accommodations would have necessitated a reasonable adjustment of seniority rules, but the Union was as unyielding in refusing to allow these accommodations as TWA was in refusing to allow accommodations not requiring such an adjustment. The simplest solution, and one that Hardison was prepared to make, was to switch shifts within Building 2 for the period at issue. Steward Tinder said that could be done only if the shift sought by Hardison was put up for bid and no one senior to Hardison took it (A. 70, 77, 84). But the seniority system would not be seriously compromised by such a temporary adjustment in bidding rights in order to fulfill a statutory obligation. Moreover, there is no showing that the union ever took any step to put the position up for bid in an effort to accommodate Hardison.

Hardison also proposed a transfer back to Building 1, where he would have had enough seniority on the graveyard shift to avoid weekend work. The union also rejected this proposal, at least in part because of a union rule requiring members to stay in one job at least

six months (A. 70-71). But there is no showing that waiver of that rule would have infringed the seniority of any other employee. Waiver of the six-month rule in this instance would have allowed Hardison to observe the Sabbath and would have caused the union little if any inconvenience and certainly no "hardship."

There was similar union opposition to Hardison's proposal, evidently acceptable to TWA, that Hardison work six days a week without being paid overtime for the sixth day. The union rejected this proposal as in violation of the collective bargaining agreement requirement that work over 40 hours per week be paid at overtime rates (A. 71). There was no exploration of whether a waiver of this rule could lead to an accommodation. Again, the collective bargaining agreement was relied upon as a self-sufficient reason for rejection of Hardison's request. But the mere terms of a private contract are not in themselves sufficient to defeat Hardison's statutory rights.

Moreover, TWA cannot fulfill its statutory obligation merely by being a passive observer willing to agree to any exchange of shifts or sections that Hardison and the union could work out within the seniority system.[7] Without taking steps to ensure that the union actually made appropriate arrangements, TWA fell short of its duty under the EEOC guidelines "to *make* reasonable accommodations to the religious needs of employees"

[7] Kussmann, the TWA official most familiar with Hardison's problem, testified he did not know why an exchange of shifts or sections was not made. He could not recall whether Tinder "refused the[se] suggestions • • •, or whether or not he indicated that he would go out and see" (A. 127).

(emphasis added). The burden of making reasonable accommodation—including the obligation to seek substitutes if necessary—is on the employer, not the employee.

Similarly, Section 701(j) requires the employer, not the employee, to demonstrate that the employer is unable reasonably to accommodate an employee's religious practices without undue hardship. By implication, the employer also has an obligation to implement a reasonable accommodation, including providing substitute workers, if it can do so without undue hardship. In addition to the court below, several other federal courts have recognized that the burden of providing substitutes rests with the employer, not the employee. See, *e.g., Draper* v. *United States Pipe & Foundry Co.,* 527 F.2d 515, 520-521 (C.A. 6); *Cummins* v. *Parker Seal Co., supra,* 516 F.2d at 550; *Shaffield* v. *Northrop Worldwide Aircraft Services, Inc., supra,* 373 F. Supp. at 941-942; *Claybaugh* v. *Pacific Northwest Bell Telephone Co.,* 355 F. Supp. 1, 5 (D. Ore.). But see *United States* v. *City of Albuquerque,* 545 F.2d 110, 114 (C.A. 10), petition for certiorari pending, No. 76-1191 (filed February 28, 1977); *Dewey* v. *Reynolds Metals Co., supra,* 429 F.2d at 330-331.[8]

Nor could TWA relieve itself of its affirmative obligation to accommodate by simply leaving to the union

[8] The legislative history of Section 701(j) (see pp. 46–49, *infra*) shows congressional disagreement with the result reached in *Dewey* and, by implication, disagreement with the suggestion therein that the employer's allowing Dewey to find a replacement for his Sabbath hours constituted a reasonable accommodation under the 1967 EEOC Guideline and that it would have been an undue hardship to require the employer to attempt to find such replacements.

the task of making the necessary arrangements and never trying to find out what action, if any, was being taken. If an employer elects to rely upon an employee's union to implement a reasonable accommodation, it must be prepared to accept the consequences of the union's failure to act.

Although TWA officials testified they were concerned that giving Hardison a variance would irritate other union members, the court of appeals correctly found that there is "no evidence to support such an inference" and that "such irritation, if real, would [not] have been an undue hardship on the employer's business" (A. 261). As this Court observed in an analogous context, "[i]f relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 775, quoting from *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 663 (C.A. 2).

The observation of the court of appeals in *Cummins* v. *Parker Seal Co., supra,* 516 F.2d at 550, is apt here: "The objections and complaints of fellow employees, in and of themselves, do not constitute undue hardship in the conduct of an employer's business. If employees are disgruntled because an employer accommodates its work rules to the religious needs of one employee, under EEOC Regulation 1605 and [42 U.S.C. (Supp. V)] § 2000e(j) such grumbling must yield to the single employee's right to practice his religion." In *Cummins,*

the complaints were "mild and infrequent." *Ibid.* Here, they were nonexistent.

Since Hardison was not granted any special relief from the seniority rule, any hardship that TWA might have thereby incurred is necessarily hypothetical. The Court should be "somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that never has been put into practice. The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted." *Draper* v. *United States Pipe & Foundry Co., supra,* 527 F.2d at 520. On this record, TWA has failed to demonstrate facts sufficient to warrant an inference that a variance for Hardison would have created an undue hardship.

Granting Hardison a variance from the seniority provisions of the collective bargaining agreement would not have seriously disrupted the normal operation of the seniority system. Other employees would merely have been subject to reassignment, in accordance with contractual seniority rights among themselves, for the four Saturdays involved—just as they would have been had Hardison been unavailable to work on those days because of illness. Nor would such a variance for Hardison deprive other TWA employees of any indefeasible rights bestowed by the collective agreement.

This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest. *Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 778. See also *Tilton* v. *Missouri Pacific Railroad Co.*, 376 U.S. 169; *Fishgold* v. *Sullivan Dry-*

dock & Repair Corp., 328 U.S. 275.[9] "[C]laims under Title VII involve the vindication of a major public interest * * *." Section-By-Section Analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972—Conference Report, 118 Cong. Rec. 7166, 7168 (1972); *Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 778, n. 40. Congress has determined, by passage of Section 701(j), that it is in the national interest that employers and unions accept such adjustments in contractual seniority rights as will enable Sabbatarians to meet their religious obligations, where this can be done without undue hardship.

TWA argues that Section 703(h), 42 U.S.C. 2000e-2(h), see footnote 3, *supra,* absolves it from liability under Title VII. But, as the Court observed in *Franks, supra,* 424 U.S. at 761, "the thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act"—hardly the case here. The Act would be self-defeating if that provision were interpreted to immunize from the Act's prohibitions particular applications of otherwise valid seniority systems that prevent the reasonable accommodations to employee religious obligations mandated by Congress.

[9] Similarly, in *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, the Court ruled that a collective bargaining agreement may enhance the seniority status of certain employees beyond that required by statute, even though this will diminish the seniority status of other employees under the previous collective bargaining agreement.

TWA contends that the court of appeals violated Rule 52(a), Fed. R. Civ. P., "by trying the issues of reasonable accommodation and undue hardship *de novo*" (Br. 20, 46-60). However, it is evident that the court of appeals "re[lied] heavily upon the findings of the District Court" (A. 247), as it said it did, and that its reversal of the district court was based not on any new or different findings of fact but on a different conclusion as to TWA's legal duty under the facts found by the district court. In essence, it found that the district court "applied an erroneous legal standard," *Kelley* v. *Southern Pacific Co.,* 419 U.S. 318, 323, in holding, on the facts it found, that TWA could not reasonably accommodate Hardison without undue hardship. Indeed, the district court explicitly recognized that the "relevant factual circumstances of this case are not substantially disputed" and that the disputes that did exist "are for the most part irrelevant" (A. 185).[10]

[10] During trial, the court repeatedly adverted to the absence of factual dispute, remarking at one point to all counsel that "[t]his case is unique in that your documentary evidence contains the quite full story" (Tr. 200). As the trial grew longer, the court expressed some exasperation that "[w]e have spent three days here when it should have taken about three hours to prepare that stipulation, because I don't think there is any possible dispute about those factual circumstances" (Tr. 411). At the close of evidence, the court said that it "has been obvious since the start of this case * * * that there are no fundamental disputed questions of fact in this case, really" (Tr. 464). Much of the case was set forth in a lengthy stipulation (A. 22–56; see A. 56–64) which the district court characterized as "very, very full" (Tr. 5). TWA's reliance on the trial court's ability to judge the demeanor of the witnesses (Br. 59–60) thus has little pertinence to this case, in which the trial court itself found virtually the entire case, on all sides, capable of stipulation (Tr. 411).

Because the basic facts were not in dispute, the court of appeals was in as good a position as the district court to decide the statutory issues, *i.e.*, whether TWA had reasonably accommodated Hardison and whether implementation of the suggested accommodations would have necessarily caused it undue hardship. Since the district court's conclusions on these questions were based upon an erroneous view of the controlling legal principles, the "clearly erroneous" standard of Rule 52(a) does not apply. *Kelley* v. *Southern Pacific Co.*, *supra*, 419 U.S. at 323. TWA has pointed to no instance where the court of appeals arrogated the fact-finding process to itself. In merely drawing different legal conclusions from the facts found by the district court, that court acted well within the proper bounds of appellate review.

II

THE REASONABLE ACCOMMODATION REQUIREMENT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

A. THE POWER OF CONGRESS, CONSISTENT WITH THE FIRST AMENDMENT, TO PROHIBIT RELIGIOUSLY DISCRIMINATORY EMPLOYMENT PRACTICES BY PRIVATE EMPLOYERS COMPREHENDS THE AUTHORITY REASONABLY TO DEFINE THE CONDUCT THAT CONSTITUTES SUCH DISCRIMINATION

Our Establishment Clause analysis begins with the premise that Title VII's basic prohibition against religiously discriminatory employment practices by private employers is a proper exercise of congressional

power under the Commerce Clause [11] and is not a "law respecting an establishment of religion." Congress may validly prohibit "sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson*, 307 U.S. 268, 275. And it is settled that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation"; the Act's thrust is directed "to the *consequences* of employment practices, not simply the motivation" (*Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431, 432; emphasis in original).

It follows that the reasonable accommodation provision at issue here does not violate the Establishment Clause, for it does no more than define "religion" in a way reasonably calculated to ensure that even those employment practices whose religiously-discriminatory consequences are subtle rather than obvious are effectively covered by the Act's basic prohibition.

Section 703(a)(1) makes it unlawful for an employer to discharge an employee "because of such individual's * * * religion." It would be the most obvious violation of that proscription were an employer to discharge an employee simply because he found the employee's religious beliefs personally repugnant. It would also be an obvious violation to base a discharge on a personal distaste for the employee's religious practices, if the practices were conducted out-

[11] See 110 Cong. Rec. 1528, 7207–7212 (1964). Cf. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241; *Katzenbach* v. *McClung*, 379 U.S. 294.

side the employment relationship and did not affect in any way the employee's job performance. Petitioners would doubtless take no issue with these propositions.

The inquiry becomes more difficult when the employee's religious beliefs dictate a form of observance that would interfere to some degree with the normal performance of his job duties. It seems clear enough, to take the most extreme example, that when an employee refuses to work at all because his religious beliefs forbid it, the employer's decision to discharge the employee would not constitute discrimination on the basis of the employee's religion. In that case there would be no means of accommodating the employee's religious observance while still maintaining the employment relationship.

At the other end of the spectrum are religious observances that may occasion the most insignificant interference with job performance. An employee's beliefs may require, for example, that he interrupt his work once or twice a day for a few moments of prayer or meditation. Common sense tells us that to discharge an employee because of such momentary interruptions may be viewed as having religiously-discriminatory consequences, unless, in the particular employment context, even the briefest pause for meditation necessarily produces a work disruption sufficiently substantial to justify the conclusion that the employer's insistence on abandonment of the practice has "a manifest relationship to the employment in question" (*Griggs* v. *Duke Power Co., supra,* 401 U.S. at 432).

Petitioners appear to argue (Br. for TWA 23, 28, 46; Br. for Unions 61, 70-71) that even the most insignificant conflict can justify a discharge and that Congress is powerless to prevent it even when only the most minimal accommodation would be required. If so, their position is untenable. For if Congress may properly prohibit subtle as well as obvious religious discrimination in employment, and if (as *Griggs* v. *Duke Power Co.* teaches) Congress may properly focus on the discriminatory consequences of employment practices and not merely on instances of intentional discrimination, then there is no reason why its power must come to an abrupt end once it may be said that the employee's religious practices affect job-related work schedules.

If the conflict between a religious observance and work schedules is minimal or can easily be avoided, Congress may validly proscribe, as religiously discriminatory, a discharge or other adverse employment action on the basis of that religious observance. To deny that Congress has that power is to say that the First Amendment sanctions religious discrimination in private employment so long as the religion is manifested, no matter how insubstantially, in work-related conduct. If this is petitioners' position, it should be rejected.

If, instead, petitioners are prepared to concede that some accommodation may validly be required with respect to some religious practices, then on what basis do they challenge the formulation chosen by Congress? One may imagine a broad spectrum of work-related religious observances, from a refusal to work at all to a momentary pause for silent prayer. The legislative task is to distinguish among those practices that are,

and those that are not, sufficiently disruptive of the employment relationship to warrant the employee's discharge from employment. If a practice is not sufficiently disruptive—that is, if the conflict is, in context, relatively insubstantial—then a discharge on that basis may properly be prohibited on the ground that its religiously discriminatory consequences are not justified by any substantial business need. Cf. *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 431-432.

In formulating a standard for differentiating between permissible and impermissible employment practices based on work-related religious observances, Congress drew upon the criteria of reasonableness—deeply entrenched in our legal tradition—and business need—the "touchstone" of Title VII (*Griggs, supra,* 401 U.S. at 431). The 1972 amendment defined "religion" to include "all aspects of religious observance and practice * * * unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. (Supp. V) 2000e(j).

Reasonable persons may perhaps disagree over whether this is the best formulation of the standard—or indeed over whether it was wise of Congress to legislate the standard at all (or to authorize its formulation by the Equal Employment Opportunity Commission) rather than leaving the matter for development by the courts. But those questions are properly within the scope of congressional authority to resolve.

Unless the Establishment Clause altogether bars Congress from protecting private employees from discharges based upon religious observances, even when the observances bear only insubstantially upon work performance, then Congress has the constitutional authority reasonably to determine the circumstances in which such a discharge will be permitted.

Any such determination, of course, will have the effect of imposing certain obligations on employers to adjust their practices to avoid religiously-discriminatory consequences. But if, as here, the congressional standard is reasonable, the Establishment Clause is no more violated by the imposition of such an obligation than it is by Title VII's imposition of the fundamental duty to avoid religious discrimination in employment. The obligation to accommodate is no more than a reasonable and proper application of the obligation to avoid religious discrimination in employment generally.

B. THE REASONABLE ACCOMMODATION PROVISION PROPERLY PROTECTS INDIVIDUALS FROM THE IMPOSITION OF UNNECESSARY EMPLOYMENT BARRIERS THAT WOULD OTHERWISE BURDEN THE EXERCISE OF THEIR RELIGION; IT REQUIRES NOTHING MORE THAN NEUTRALITY IN THE FACE OF RELIGIOUS DIFFERENCES

Petitioners' Establishment Clause argument, at bottom, is that any law requiring one individual to adjust his conduct in order to accommodate himself to another individual's religious observances has the impermissible effect, no matter how reasonable the required accommodation may be, of establishing the religion to which the accommodation is required (see Br. for TWA 23, 26, 28, 29, 36, 40, 41; Br. for Unions 48-54, 56-58,

66-71). Title VII's reasonable accommodation provision is invalid, according to petitioners' analysis, because it compels private employers to adjust their business practices, including those governed by the seniority provisions of a bona fide collective bargaining agreement,[12] to accommodate the religious observances of their employees.

Petitioners have cited no decision of this Court to support the proposition that any law requiring the alteration of private conduct in deference to the religious needs of others is an impermissible establishment of religion. On the contrary, petitioners' analysis is incompatible with the principles of this Court's Establishment Clause decisions.

We start with the principle that a State may—and in some cases must—exempt from the operation of a facially neutral condition or requirement persons whose sincere religious beliefs or practices would be burdened by its application to them. *Sherbert* v. *Verner*, 374 U.S. 398, is the most pertinent illustration of the principle. The Court there invalidated, as an unconstitutional burden on the free exercise of religion, a state law denying unemployment compensation benefits to a member of the Seventh-Day Adventist Church because of her refusal, in accordance with the tenets of her religion, to accept employment requiring Saturday work. The Court held that the State could

[12] As shown above, pp. 22–25, the court of appeals correctly ruled that the question whether Title VII required TWA to take any action inconsistent with the seniority provisions of the collective bargaining agreement need not be reached here.

not, consistently with the Free Exercise Clause, force a sincere Saturday Sabbatarian "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand" (374 U.S. at 404).

Apart from its free exercise holding, the Court in *Sherbert* also considered whether the Establishment Clause barred imposing on the State the duty to exempt from its usual eligibility requirements any claimant whose unavailability for Saturday work was due to religious observance. The Court declared: "In holding as we do, plainly we are not fostering the 'establishment' of the Seventh-Day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall" (374 U.S. at 409).

Even the two dissenting Justices (Mr. Justice Harlan, joined by Mr. Justice White)—who objected to the Court's free exercise holding on the ground that it would require the State to "*single out* for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior (in this case, inability to work on Saturdays) is not religiously motivated" (374 U.S. at 422; emphasis in original)—believed that under the

Establishment Clause "it would be a permissible accommodation of religion for the State, if it *chose* to do so, to create an exception to its eligibility requirements for persons like the appellant" (*ibid.;* emphasis in original). "The constitutional obligation of 'neutrality,' " the dissenting Justices stated, "is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation" (*ibid.*).

Two years earlier, in *Braunfeld* v. *Brown,* 366 U.S. 599, the Court had upheld the constitutional validity of Pennsylvania's Sunday closing law as applied to retail merchants whose religious beliefs—like those of Mrs. Sherbert—precluded them from working on Saturdays. Although the Court divided over whether the Free Exercise Clause *required* the State to exempt Saturday Sabbatarians from the operation of the Sunday closing laws, no Justice doubted that the Establishment Clause permitted a State voluntarily to provide such an exemption. Indeed, the plurality opinion, recognizing that several States had in fact taken that approach, observed that "this may well be the wiser solution to the problem" (366 U.S. at 608).[13]

Finally, in *Wisconsin* v. *Yoder,* 406 U.S. 205, the Court ruled that the Free Exercise Clause precluded the application of Wisconsin's compulsory school-attendance law to Amish parents who sincerely believed that high school attendance for their children was

[13] See also Mr. Justice Frankfurter's separate opinion, joined by Mr. Justice Harlan, in *McGowan* v. *Maryland,* 366 U.S. 420, 459, which applied also to *Braunfeld*: "However preferable, personally, one might deem such an exception [for Saturday Sabbatarians], I cannot find that the Constitution compels it" (366 U.S. at 520).

contrary to their religion. The Court, relying on *Sherbert*, rejected the suggestion that "recognizing an exemption for the Amish from the State's system of compulsory education constituted an impermissible establishment of religion" (406 U.S. at 234-235, n. 22). "Accommodating the religious beliefs of the Amish," the Court stated, does not "support, favor, advance, or assist the Amish," but simply "allow[s] their centuries-old religious society * * * to survive free from the heavy impediment compliance with the Wisconsin compulsory-education law would impose" (*ibid.*).

If it is not an establishment of religion for a State to pay unemployment compensation benefits to a claimant who, but for his religious beliefs and observances, would be denied benefits, and if it is not an establishment of religion for a State to carve out an exception from its Sunday closing laws or compulsory education laws for persons who, but for their religious beliefs and observances, would be required to conform to those laws, then would it be an establishment of religion for a state, in its role as an employer, to make reasonable accommodations to those of its employees whose religious beliefs or observances conflict with normal work schedules? Would it be permissible, for example, for a State agency to excuse a Seventh-Day Adventist from regularly scheduled Saturday work if, without undue hardship to the conduct of the agency's operations, it could arrange for other employees to cover for the absent individual?

The answer, in our view, is clear. For if a State were unable to make such an accommodation, the Seventh-Day Adventist employee would be subjected to the same

kind of burden on the exercise of his religion to which Mrs. Sherbert was subjected by the operation of South Carolina's eligibility requirements for unemployment compensation benefits. Like Mrs. Sherbert, the employee would be forced to "choose between following the precepts of [his] religion and forfeiting benefits [government employment], on the one hand, and abandoning one of the precepts of [his] religion in order to accept [keep] work, on the other hand" (374 U.S. at 404). Whether or not the Free Exercise Clause would require the State to relieve its employee of this burden, the Court's decisions make clear that the Establishment Clause would not prohibit the State from doing so. Here, no less than in *Sherbert*, accommodating the Seventh-Day Adventist would involve nothing more than "neutrality in the face of religious differences" (*id.* at 409).

Nor would it be any more an establishment of religion because the State might have to adjust the work schedules of other employees to accommodate their colleague's Saturday absences. An adjustment of that sort would not "serve to abridge any other person's religious liberties" (*ibid.*), and, as this Court stated in *Zorach* v. *Clauson,* 343 U.S. 306, 315, the Establishment Clause does not mean that "public institutions can make no adjustments of their schedules to accommodate the religious needs of the people." On the contrary, the Court stated, when a State "cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of

our people and accommodates the public service to their spiritual needs" (343 U.S. at 314).

The Court in *Zorach* upheld the validity of a public school "released time" program, even though one of the "adjustments" made necessary by the program required the teachers and students who remained in school during the "released time" period to suspend normal school activities to assure that "the nonreligious attendants [would] not forge ahead of the church-going absentees" (343 U.S. at 324; dissenting opinion of Mr. Justice Jackson). *Zorach* alone thus answers petitioners' contention that requiring one person to accommodate the religious observances of another is a violation of the Establishment Clause. Such a requirement, if otherwise reasonable, is not an establishment of religion as long as it does "not make a religious observance compulsory" and does "not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction" (343 U.S. at 314).[14]

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[14] Thus, a selective service law that exempts religious conscientious objectors from military conscription does not violate the Establishment Clause (*Selective Draft Law Cases,* 245 U.S. 366, 389–390; see *Welsh* v. *United States,* 398 U.S. 333, 369–374 (dissenting opinion); *Gillette* v. *United States,* 401 U.S. 437), even though that religious exemption inevitably requires some other person, in deference to the objector's religious beliefs, to adjust his own conduct to the point of entering military service in place of the objector. Similarly, a state law "forbidding certain activities to be conducted within a set distance from a place of public worship" on Sundays—a prohibition that requires a more direct, if less consequential, accommodation by private persons to the religious practices of others—was sustained by this Court in *Gallagher* v. *Crown Kosher Super Market,* 366 U.S. 617, 627. "[B]ecause the State wishes to protect those who do worship on Sunday does not mean that the State means to impose religious worship on all" (*ibid.*; plurality opinion).

If, therefore, a State does not establish religion when it reasonably accommodates the religious observances of its own employees (and requires other state employees to make the necessary adjustments) we see no basis for concluding that it violates the Establishment Clause when it requires private employers to do the same thing. In neither case is there any prohibited advancement of religion or any interference with the religious liberty of others. In each, the reasonable accommodation reflects, as in *Sherbert*, "neutrality in the face of religious differences" (374 U.S. at 409).

If the government may validly and neutrally relieve its own employees of a burden on the exercise of their religion, there is no Establishment Clause bar to extending the same protection to private employees. Congress is not forbidden to foster an environment, in private industry as well as public employment, that is hospitable to "as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary" (*Zorach* v. *Clauson, supra,* 343 U.S. at 313). Quite apart from what the Free Exercise Clause may require, "it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with 'our happy tradition' of 'avoiding unnecessary clashes with the dictates of conscience'" (*Gillette* v. *United States,* 401 U.S. 437, 453).

As this Court stated in *Walz* v. *Tax Commission,* 397 U.S. 664, 669, short of "governmentally established religion or governmental interference with religion * * * there is room for play in the joints productive of a benevolent neutrality which will permit religious

exercise to exist without sponsorship and without interference." That is the aim and the effect of Title VII's reasonable accommodation requirement.

C. THE REASONABLE ACCOMMODATION PROVISION REFLECTS A CLEARLY SECULAR PURPOSE, HAS A PRIMARY EFFECT THAT NEITHER ADVANCES NOR INHIBITS RELIGION, AND AVOIDS EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION

This Court has formulated, in cases involving government financial aid to religious educational institutions, a three-part test to help "identify instances in which the objectives of the Establishment Clause have been impaired" (*Meek* v. *Pittenger,* 421 U.S. 349, 359). "[T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, * * * second, must have a primary effect that neither advances nor inhibits religion, * * * and, third, must avoid excessive government entanglement with religion" (*Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 773).

This case, of course, involves no financial support to any religious institution—one of the principal "evils against which the Establishment Clause protects" (*Meek* v. *Pittenger, supra,* 421 U.S. at 359)—and there may accordingly be room to argue that a less rigorous test should be applied. We do not advance such an argument, however, because the statutory provision at issue in this case so plainly satisfies each element of the three-part test.

1. The reasonable accommodation provision challenged by petitioners serves the same "clearly secular

legislative purpose" (*Committee for Public Education* v. *Nyquist, supra,* 413 U.S. at 773) as that served by Title VII generally—"to achieve equality of employment opportunities" by "remov[ing] * * * artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification" (*Griggs* v. *Duke Power Co., supra,* 401 U.S. at 429, 431). Congress has properly determined that an individual's employment opportunities should depend solely upon job qualifications and that one's religion—as well as one's race, nationality, and sex—should not be permitted to affect those opportunities except in the rare instance when it bears significantly on the question of job qualifications. The reasonable accommodation provision (Section 701(j) of the Act) represents a permissible legislative effort—plainly secular in purpose—to identify the circumstances in which it may fairly be said that an individual's religious practices are sufficiently relevant to his job qualifications that they may properly be taken into account in connection with an employment decision.

This secular purpose is reflected in the provision's legislative history. Section 701(j) was added in 1972 by a Senate floor amendment to the Equal Employment Opportunity Act of 1972, 86 Stat. 103. Senator Randolph, who proposed the amendment, stated that it was intended to further Title VII's guarantee of "freedom from religious discrimination in the employment of workers" and "to resolve by legislation—and in a way I think was originally intended by the [1964] Civil

Rights Act—[an issue] which the courts apparently have not resolved" (118 Cong. Rec. 705, 706 (1972)). That issue was the extent to which Title VII's ban on religious discrimination limited an employer's freedom to discharge or refuse to hire an individual whose religious practices or observances conflicted with the employer's work schedules. Senator Randolph referred (118 Cong. Rec. 705-706 (1972)) to *Dewey* v. *Reynolds Metals Co.,* 402 U.S. 689, which had affirmed by an equally divided Court a Sixth Circuit decision (429 F. 2d 324) sustaining the lawfulness of an employer's discharge of an employee who refused for religious reasons to work on Sundays.[15]

Senator Randolph's remarks included an expression of special concern about the dwindling membership of some Sabbatarian sects (118 Cong. Rec. 705 (1972)), but the overriding theme of his observations was that the amendment was needed to eliminate "religious discrimination in * * * employment" (*ibid.*), and he agreed with Senator Dominick that the provision would protect the equal employment opportunities, not only of Sabbatarians, but also the members of any "other religious sect which has a different method of conducting their lives than do most Americans" (*id.* at 706). The aim was not to advance religion but rather, in "the

[15] Senator Randolph inserted into the Congressional Record the Sixth Circuit's opinion and this Court's order of affirmance in *Dewey,* a district court opinion in a similar case, and the Equal Employment Opportunity Commission's 1967 Guidelines on Discrimination Because of Religion (which imposed a reasonable accommodation requirement nearly identical to that proposed by Senator Randolph (118 Cong. Rec. 706–730 (1972)).

spirit of religious freedom" (*ibid.*), to ensure that no individual's religious practices would needlessly restrict his work opportunities. That is a valid secular objective fully in accord with the purposes of Title VII as a whole.

That a law may, in the minds of some legislators, have a religious purpose in addition to a proper secular purpose does not, under this Court's decisions, render it invalid under the Establishment Clause. The Court's test requires only that a law reflect a valid secular purpose. It does not mean that the law must be devoid of all religious purpose whatsoever.[16]

Furthermore, while one of Senator Randolph's purposes in proposing his amendment may have been to prevent the dwindling of the membership rolls of some religious groups, that is not, in the context of his specific proposal, a purpose to advance religion. Rather, his amendment's purpose was to assure that no individual of any faith will needlessly be required "to choose between his religious faith and his economic survival" (*Braunfeld* v. *Brown, supra,* 366 U.S. at 616) (Stewart, J., dissenting)—thereby necessarily also protecting religious institutions from the adverse consequences of religiously discriminatory employment practices. That is an entirely legitimate legislative objective.

We accordingly conclude that Section 701(j) "is adequately supported by legitimate, nonsectarian [governmental] interests" (*Committee for Public Education* v. *Nyquist, supra,* 413 U.S. at 773). That was also the conclusion of Senator Williams—chief sponsor and floor manager of the 1972 Senate bill—at the time of Senator Randolph's floor amendment. After discussing with Senator Randolph the extent of the accommodation that would be required of an employer under the proposed amendment, Senator Williams stated that he "certainly agree[d] with the objective of the amendment," that the provision appeared to promote the free exercise values embodied in the First Amendment, and that he could see "no problem" with the provision under the Establishment Clause (118 Cong. Rec. 706 (1972)).

[16] There is, for example, no constitutional requirement that all coincidence between the Ten Commandments and the prohibitions in the criminal code be entirely inadvertent.

2. The primary effect of the reasonable accommodation provision is the same as its secular purpose—to preserve the equal employment opportunities of individuals whose religious requirements conflict with the work schedules of their employers but can be accommodated without undue hardship. The primary effect neither advances nor inhibits religion but rather removes artificial and unnecessary barriers to employment by ensuring that a person's religion or religious observance remains "irrelevant" (*Griggs* v. *Duke Power Co., supra,* 401 U.S. at 436) in connection with his job opportunities except when they significantly affect his job qualifications. As the court of appeals stated in *Cummins* v. *Parker Seal Co., supra,* 516 F.2d at 553:[17]

[17] In rejecting petitioners' constitutional challenge, the court of appeals relied heavily upon the Sixth Circuit's opinion in *Cummins* (A. 265–266).

> In practice, the reasonable accommodation rule restrains employers from enforcing uniform work rules that, although facially neutral, discriminate in effect against employees holding certain religious convictions. Thus the rule guarantees job security except when accommodation of an employee's religious practices would impose an undue hardship upon the employer's business.

The accommodation requirement may incidentally benefit some religious institutions by allowing working men and women to attend religious services without forfeiting their jobs. But that was equally true of the Sunday closing laws upheld by this Court in *McGowan* v. *Maryland, supra,* and its companion cases. See also *Zorach* v. *Clauson, supra.* Indeed, this Court has repeatedly recognized that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid" (*Committee for Public Education* v. *Nyquist, supra,* 413 U.S. at 771). The statute here does not compel church attendance or religious contributions, nor does it limit its protection to persons whose religious observance includes organized religious activity.

Petitioners object to the statute on the ground that it grants "preferential treatment" to a class of persons determined strictly on religious grounds (Br. for TWA 23; Br. for Unions 50-51). But when the evil that Congress seeks to eradicate—employment discrimination because of religion—itself affects a class of persons determined strictly on religious grounds, a legislative

prohibition of the offensive conduct does not grant "preferential treatment" to the affected class but merely relieves its members of a special burden that others do not suffer.[18]

This Court's decisions demonstrate the fallacy of petitioners' "preferential treatment" argument. If it is not a violation of the Establishment Clause to pay unemployment compensation benefits to a claimant solely because her apparent ineligibility is a function of Sabbatarian religious observances (*Sherbert* v. *Verner, supra*), or to exempt from the operation of Sunday closing laws a class of persons whose religious beliefs require the observance of some other day as the Sabbath (*Braunfeld* v. *Brown, supra*), or to excuse from compliance with compulsory school attendance laws persons whose religious beliefs and practices conflict with such a requirement (*Wisconsin* v. *Yoder, supra*), or to release from public school attendance a class of students who wish to go to religious centers for religious instruction or devotional exercises (*Zorach* v. *Clauson, supra*), then neither does it violate the Establishment Clause to extend equal employment opportunity protection to a class of individuals whose religious observances might otherwise needlessly cost them their jobs. While it is possible to label pejoratively all such efforts

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[18] Petitioners themselves grant "preferential treatment" to Christians. The collective bargaining agreement names Good Friday and Christmas—but none of the holy days of other religions—as company holidays (A. 216), although, of course, T.W.A. operates on those days. Such a reasonable accommodation to majority religious beliefs places a greater hardship on T.W.A. (which pays 2½ times the usual rate for work on those days) than the accommodation which Hardison seeks.

to accommodate free exercise values as "preferential treatment," that does not in itself detract from their constitutional permissibility. Nor does the reasonable accommodation rule improperly "foster * * * certain sects" (Br. for TWA 38-39). The statute on its face applies to "*all* aspects of religious observance and practice" (emphasis added), and the legislative history confirms that no one sect or group of sects was intended to be singled out for protection to the exclusion of others (see p. 47-48, *supra*). As in *Gillette* v. *United States, supra*, 401 U.S. at 450-451, "no particular sectarian affiliation or theological position is required," and the statute "does not single out any religious organization or religious creed for special treatment." [19]

If, by its operation, the statute protects from needless loss of employment only those workers whose religious beliefs require them to behave in a way that conflicts with their employers' work schedules, that is not legislative favoritism of some religious sects over others. It merely defines the class of workers whose employment opportunities would otherwise be reduced because of "unnecessary barriers" (*Griggs* v. *Duke Power Co., supra,* 401 U.S. at 431) that Congress—for valid secular reasons—sought to eliminate.

TWA's favoritism argument is essentially the same as the one rejected in *Gillette*, where the Court found

[19] The Equal Employment Opportunity Commission has adopted, in its application of the reasonable accommodation requirement, the same broad definition of religion that this Court applied in *United States* v. *Seeger*, 380 U.S. 163, and *Welsh* v. *United States*, 398 U.S. 333, in connection with the military conscientious objector provision. *E.g.*, EEOC Decision No. 76–104 (April 2, 1976), reported at CCH EEOC Dec. ¶ 6500.

"a neutral, secular justification" (401 U.S. at 460) for exempting from military service only those conscientious objectors who were opposed to participation in war in any form and not those who were opposed to participation in a particular war only. The contention there, like the company's assertion here, was that the statutory provision "work[ed] a de facto discrimination among religions" (*id.* at 451-452) by favoring those whose doctrine brought their adherents within the scope of the exemption.

As in *Gillette*, the statute here serves "valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions" (*id.* at 452), and its provisions are "focused on individual conscientious belief, not on sectarian affiliation" (*id.* at 454). Indeed, the statute here, unlike that in *Gillette,* is not even arguably "underinclusive" (*id.* at 452). The protected class here is fully coextensive with the class of persons who might otherwise be subjected to needless restrictions on employment opportunities on account of their religious practices.

In sum, the primary effect of the reasonable accommodation provision is "not to support, favor, advance, or assist" religion generally or some religions in particular (*Wisconsin* v. *Yoder, supra,* 406 U.S. at 234-235, n. 22). Rather, it is to prevent employment discrimination on the basis of an individual's religious practices by requiring employers to accommodate such practices if they can reasonably do so without undue hardship in the conduct of their business. That the statute thereby allows working persons to practice their religion "free from the heavy impediment" (*ibid.*) that such discrim-

ination would otherwise impose does not render the provision unconstitutional. On the contrary, it tends to further the interests of the Establishment Clause by allowing for religious diversity and pluralism—— "mak[ing] room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary" (*Zorach* v. *Clauson, supra,* 343 U.S. at 313). The reasonable accommodation provision reflects a wholly proper "attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma" (*ibid.*).

3. The statute involves no excessive government entanglement with religion. The reasonable accommodation requirement will not subject religious institutions to the sort of "comprehensive, discriminating, and continuing [governmental] surveillance" that this Court found impermissible in *Lemon* v. *Kurtzman,* 403 U.S. 602, 619. The statute and regulation require little or no contact between religious institutions and governmental entities.

TWA sees the danger of excessive entanglement in that "those enforcing the requirement will necessarily weigh and determine whether an individual has a religious belief, whether it is sincerely held and how that belief is manifested in the employment relationship" (Br. 42; footnote omitted).[20] But the inquiry required here is essentially the same as that mandated, as a constitutional requirement, by this Court's decision in *Sherbert* v. *Verner, supra,* and regarded unanimously

[20] The Unions advance a similar argument (Br. 42–46).

by the Justices participating in that decision as permissible under the Establishment Clause. As the court of appeals explained in *Cummins* v. *Parker Seal Co., supra,* 516 F.2d at 553-554:

> For the most part, the EEOC and the courts will have to determine simply whether the employer has made a reasonable accommodation and whether an undue hardship will result. These issues will be considered in the labor relations context, and their resolution certainly does not necessitate any government entanglement with religion.
>
> [Parker Seal] suggests, however, the EEOC investigators will be forced to study and to evaluate the dogma of the many religious sects in order to ascertain whether employees' practices and observances are genuinely religious and therefore protected under Title VII. In most cases, this issue probably will not be disputed seriously. To the extent that the question does arise, however, we think that it will require no more government involvement in religion than the concededly nonexcessive entanglement that occurs when a state must determine whether a purported church qualifies for a property tax exemption. *See* Walz v. Tax Comm'n, 397 U.S. 664, 674-76 (1970); *id.* at 698-99 * * * (opinion of Harlan, J.).

Contrary to TWA's interpretation of the legislative history of Section 701(j) (Br. 42 n. 25), the flexibility and discretion with which Congress believed the statute would be administered refer not to judgments concern-

ing the sincerity of an employee's beliefs or the tenets of his religion but rather to the pragmatic determinations concerning reasonableness and undue hardship in the circumstances of particular cases. Although some inquiry into sincerity may occasionally be required, that has not generally been an issue in cases involving the reasonable accommodation requirement.[21]

The government's involvement with religious institutions under the statute "can hardly be characterized as * * * active" (*Wisconsin* v. *Yoder, supra,* 406 U.S. at 234 n. 22). Rather, it would be " 'quick and non-judgmental' " (*Roemer* v. *Maryland Public Works Bd.,* No. 74-730, decided June 21, 1976, slip op. 26 (plurality opinion)).

[21] See, *e.g., Reid* v. *Memphis Publishing Co., supra,* 468 F. 2d at 348 (C.A. 6); *Riley* v. *Bendix Corp., supra,* 464 F. 2d at 1114 (C.A. 5); *Dewey* v. *Reynolds Metals Co., supra,* 429 F. 2d at 335; *Dawson* v. *Mizell,* 325 F. Supp. 511, 513 (E.D. Va.); *Jackson* v. *Veri Fresh Poultry Inc.,* 304 F. Supp. 1276, 1278 (E.D. La.).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1126

TRANS WORLD AIRLINES, INC., *Petitioner,*

vs.

LARRY G. HARDISON, ET AL.

No. 75-1385

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO ET AL., *Petitioners,*

vs.

LARRY G. HARDISON, ET AL.

On Writ of Certiorari To the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1126

TRANS WORLD AIRLINES, INC., *Petitioner,*

vs.

LARRY G. HARDISON, ET AL.

No. 75-1385

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO ET AL., *Petitioners,*

vs.

LARRY G. HARDISON, ET AL.

On Writ of Certiorari To the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS AMICUS CURIAE

This brief is being filed with the consent of both parties in No. 75-1385, and with the consent of the respondent in No. 75-1126.[1]

It is joined by the following organizations: Agudath Israel of America, National Council of Young Israel, Rabbinical Council of America, and Union of Orthodox Jewish Congregations of America.

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[1] The petitioner in No. 75-1126 takes no position for or against our filing.

Agudath Israel of America is a national organization with congregational and individual members with branches in major Jewish population centers throughout the country. The National Council of Young Israel is a coordinating body for more than 100 affiliated Orthodox Jewish synagogues throughout the United States. The Rabbinical Council of America is the largest Orthodox Jewish rabbinical organization in the world with a membership of more than 1000. The Union of Orthodox Jewish Congregations of America is a central coordinating body for approximately 3000 Orthodox Jewish congregations in the United States. All of these organizations have a vital concern for the protection of religious liberty, particularly the right of the observant to be gainfully employed.

INTEREST OF THE AMICUS

COLPA is a voluntary association of attorneys and social scientists organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox Jewish community on matters of public concern. The federal regulation and legislation challenged by petitioners—Section 1605.1 of the EEOC Regulation and Title VII of the Civil Rights Act of 1964, as amended in 1972 by the addition of Section 701(j)[2]—and similar State antidiscrimination laws have opened employment doors which had previously been closed to the Sabbath observer. Orthodox Jews, who are enjoined by Biblical

[2] References made to "Section 701(j)" in this brief should generally be taken to include 29 C.F.R. § 1605.1 (1975), which is the model on which the 1972 legislation was based and which, according to its legislative history, was meant to be enacted into law by Congress in 1972.

command, provided in Exodus and Deuteronomy, to "observe the Sabbath day and keep it holy" and "not [to] do any manner of work" on that day,[3] did not enjoy equal employment opportunities and were barred by employment policies from positions open to other individuals in our society. They were turned away from job after job and suffered economic hardship only because they steadfastly refused to violate the Biblical injunction against working on the Sabbath. Before the enactment of these laws, Sabbath observers were "free" to practice their religion, but this "freedom" often carried a severe penalty—inability to secure employment, and loss of jobs when their Sabbath observance became known.

With the announcement of Section 1605.1 and enactment of Section 701(j) (as well as similar State laws), there dawned a new era in which Sabbath observance was no longer the obstacle to employment it

[3] Observance of the Sabbath is considered a fundamental tenet of Judaism to the extent that the Talmud views it as equal to all the other commandments of the Torah. He who profaned the Sabbath was treated as an idolator (*Talmud Hullin* 5a) and was excluded from all of the privileges and rights accorded to observant Jews in the synagogue. Maimonides, in his Laws of the Sabbath, said:

> 1. Abstention from work on the seventh day of the week is a positive commandment, for Scripture says, *But on the seventh day thou shalt rest* (Exod. 23:12, 34:21). Consequently, whosoever does work on the seventh day disregards a positive commandment, and also transgresses a negative commandment, for Scripture says, *Thou shalt not do any manner of work* (Exod. 20:10, Deut. 5:14).
>
> What is the penalty for doing work? If one does work voluntarily and deliberately, he is liable to extirpation; if witnesses were present and a warning was given, he is liable to stoned; if he does work inadvertently, he is liable to a fixed sin offering.

once had been. Recognizing the crucial importance of employment opportunities for *all* Americans, the EEOC, and then the Congress, directed that an employer may not reject or terminate a Sabbath observer unless the employer establishes that his employment or retention would cause undue hardship to the operation of his business. The law made the phrase "equal employment opportunity" a reality for the religious observer in our society.

Hence the statute under attack is of vital importance to our community. Its salutary effect cannot be overemphasized. In the past ten years COLPA has assisted thousands of individuals in formally and informally enforcing their rights under this statute and under similar State antidiscrimination laws. These cases have involved the widest variety of employment. We can attest to the fact that countless individuals have become gainfully employed, enjoying equal benefits with all other citizens. We can also attest to the fact that in nearly all cases where "hardship" has initially been asserted by an employer, and where the Sabbath-observing employee has then been hired or retained because of the operation of law notwithstanding the expected "hardship," the reality has belied the anticipation. "Hardship" has too often proven to be a facile excuse for an unwillingness to undergo some slight inconvenience, or to depart from an inflexible policy, whose inflexibility is unsupported by genuine necessity—with devastating effect on the religious observer. Congress' enactment of this law, cast in terms of moderation, reasonableness and deference to actual proof of legitimate employer hardship, is a sound and sensible means of prohibiting thoughtless discrimination while acknowledging those instances

where real hardship exists. This Court should not overturn so considered and thoughtful a legislative judgment.

QUESTIONS PRESENTED

1. Whether the Establishment Clause of the First Amendment is violated by a federal interpretive regulation of the EEOC and a federal statute which require private employers to make "reasonable accommodation" to the mandated religious observances and practices of their employees and forbid rejections of such employees unless an employer can demonstrate that the observances create "undue hardship" on the conduct of the business.

2. Whether the "undue hardship" standard of Section 701(j) of the Civil Rights Act of 1964, as amended, was satisfied by proof that an employer might have to assign other employees with greater seniority to substitute for the religious observer or might have to pay overtime to a substitute employee.

ARGUMENT

Introduction

Certiorari was granted in this case after this Court, with only eight Justices participating, affirmed, by an equal division, the judgment of the Court of Appeals for the Sixth Circuit in *Cummins* v. *Parker Seal Co.*, 516 F.2d 544, affirmed as No. 75-478, 97 S. Ct. 342 (1976). The apparent disagreement here over the proper result to be reached in the *Cummins* case, as manifested during oral argument of that case on October 12, 1976, leads us to conclude that there is substantial misapprehension as to the meaning, purpose and effect of Section 701(j) of the Civil Rights Act of 1964, as amended in 1972, and that the parties and

amici (including ourselves) in the *Cummins* case failed to portray for the Court the actual operation of the law.

COLPA is the principal private voluntary organization in the United States that is involved, on a day-to-day basis, with the implementation of Section 701(j) and the various State statutes and regulations that rest on the principle enunciated in Section 701 (j). Our staff and volunteer attorneys have negotiated accommodations and have discussed with prospective and present employers of Sabbath-observers those undue hardships that exist or are feared in such an employment relationship. And we represent to this Court that the actual operation of such laws bears no resemblance to the speculative and hypothetical horrors that are paraded before the Court by those challenging the statute. In an Appendix to this brief, we survey the implementation of such a law in various industries in New York, where it has been fully and properly applied.

We will try in this brief to supplement the legal arguments we presented in our *Cummins* brief by responding specifically to six concerns voiced in the course of the argument in *Cummins*.

First, we discuss the relationship between Section 701(j) and the basic prohibition of the Title VII of the Civil Rights Act (Section 703(a)(1)) which forbids employment discrimination on account of religion. The attorneys for petitioners here apparently do not disagree with the observation of petitioner's counsel in *Cummins* that Congress could properly and legitimately forbid discrimination on account of religious belief in order to "purge channels of interstate commerce of irrational acts of employment which

tend to cut out of the job market certain people on the basis of irrational and irrelevant considerations."[4] We emphasize Mr. Justice White's observation, which is supported by the language, legislative history, and actual implementation of Section 701(j), that this law—which extends protection to religiously motivated conduct—was similarly intended by Congress "to clear interstate commerce of religious discrimination *which can reasonably be avoided,*"[5] and that it has that effect.

Second, we respectfully submit that Mr. Justice Powell's characterization of the statute as commanding "preferred treatment" for religionists and compelling employers "to accord a privilege, a benefit, to an employee because of his religious choice or preference"[6] does not correctly describe Section 701(j) or how it has been implemented. Section 701(j) accords no "preference" whatever. Moreover, those whose religions place them in a majority in this country enjoy certain prerogatives as employees simply because various aspects of the majority faith have, over the course of years, become secularized. Sunday laws and the celebration of Christmas are obvious examples of this development. Section 701(j) merely gives to minority religionists the same opportunities that our accepted mode of life gives to those of the majority faith.

Third, contrary to the suggestion made during oral argument of the *Cummins* case, this law does not give the employee protected by it a "free ride" at his em-

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[4] Transcript of Oral Argument, *Parker Seal Co.* v. *Cummins,* No. 75-478, p. 48.

[5] *Id.* at p. 48 (emphasis added).

[6] *Id.* at pp. 42-43.

ployer's expense.[7] The principle of "reasonable accommodation" means that an employee who seeks to be hired or retained even though his religious observance or practice conflicts with a general work-schedule imposed by his employer must be prepared to make some sacrifice, either in wages or in availability at other times.

Fourth, the two "burdens" imposed on an employer by Section 701(j)—the burden of arranging a reasonable accommodation and the burden of explaining why he is unable to do so if no accommodation is made—are not, as was suggested during the *Cummins* argument,[8] unfair shifts of "responsibility" to the employer of the consequences of an employee's personal faith. These are burdens that relate exclusively to *information* available principally to one of the two parties in the employer-employee relationship. The employee must cooperate in arriving at a working "accommodation"—as that word plainly manifests—but it is the employer who has the knowledge of the

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[7] The Deputy Solicitor General was asked (*id.* at p. 37):

> Suppose a man is being paid so much money to work six days a week during the whole year, and then he joins a church and he gets 52 days off with pay, just like that. Isn't that right?

[8] The Deputy Solicitor General was asked (*id.* at p. 36):

> What's your idea of whose burden this accommodating business is? Don't you think an employer—the man has been working for years on Saturday, then he comes in and says, "I'm sorry, I've joined the church and I can't work on Saturday any more." Now, does he have some job, some responsibility of suggesting how this can be done?
>
> MR. WALLACE: Well, he is not managing the plant. If you say——
>
> QUESTION: But he's the one who joined the church.
>
> MR. WALLACE: That is correct, but——
>
> QUESTION: He brought the issue up.

over-all availability of workers and who alone can explain if he is unable to devise an acceptable arrangement.

Fifth, the adjustment that must be made in a statutory accommodation by other employees—whether or not covered by a labor contract—has been magnified out of all proportion.[9] Employers customarily adjust work schedules to the medical, educational, and other personal needs of their employees; federal law now requires that such accommodation be made by federal contractors for those who have physical or mental impairments that qualify them as "handicapped." 29 U.S.C. § 793(a). Section 701(j) places the personal religious requirements of an observer on the same level as the personal medical requirements of a handicapped employee. And it subjects his or her coworkers to inconveniences similar in kind and degree to those they are expected to endure for a variety of other scheduling adjustments that are common to every substantial business operation.

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[9] Respondent's counsel in *Cummins* was asked (*id.* at p. 28):

> Didn't they also single out the others because of their beliefs in telling them they had to work overtime?

Shortly thereafter, he was asked (*id.* at p. 31):

> What you are saying suggests that this gentleman expected the whole establishment to revolve around him, to accommodate him, that other employees would have to be imposed upon, one way or another, in order to grant him total freedom from Saturday work. And you say that an employer must simply continue to tolerate that?

Petitioner's counsel also engaged in an extensive colloquy with Mr. Justice Powell as to whether a collective bargaining agreement is involved in any of the reported cases arising under the law (*id.* at pp. 46-47).

Sixth, the fact that the government is not the employer so that there is no immediate and direct involvement of the Free Exercise Clause in the employment relationship does not disable Congress from promoting "free exercise values" by appropriate legislation such as Section 701(j).[10] If Congress or a local legislature may "purge" major employment relationships of discrimination based on conditions that are not mentioned in the Constitution such as handicapped status, age, sex, or even prior criminal record, it would be anomalous if it could not do so when the activity being protected is so important to the national welfare that it is "within a specific prohibition of the Constitution, such as those of the first ten amendments." *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152 n. 4 (1938).

I

THE ESTABLISHMENT CLAUSE DOES NOT PROHIBIT A LEGISLATURE FROM REQUIRING "REASONABLE ACCOMMODATION" BY A PRIVATE EMPLOYER TO HIS EMPLOYEES' RELIGIOUS OBSERVANCES

This case tests the validity of a reasoned legislative response to a serious economic and social problem

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[10] Petitioner's counsel in *Cummins* provided the following answer to a question asked by Mr. Justice Rehnquist during oral argument (*id.* at pp. 44-45):

> QUESTION: What if the Civil Service Commission had adopted precisely this sort of a regulation to be applicable to Government agencies? Would you say that violated the Establishment Clause?
>
> MR. BECKER: There, I think, once again, Mr. Justice Rehnquist, we would be in the posture that the Government, in order to avoid infringement upon free exercise, would have to make allowances. But that's because it's the Government which is the employer in that case.

that affects hundreds of thousands, and possibly millions, of Americans: What treatment should be afforded by substantial private employers to present or prospective employees whose religious convictions have an effect, be it small or large, on their ability to satisfy all formally stated conditions of employment? Congress considered this question in 1972, when it was evaluating the 1964 Civil Rights Act and adding to it amendments that ultimately took the form of the Equal Employment Opportunity Act of 1972. It decided that the proper response to this problem was to require "reasonable accommodation" on the part of employers because this would, in the language used to explain the general objectives of the law, "further promote equal employment opportunities for American workers." S. Rep. No. 92-681, 92d Cong., 2d Sess. (1972), p. 1. The requirement of "reasonable accommodation" is challenged in this case on constitutional grounds, but before we turn to a specific analysis of the constitutional contentions, we direct the Court's attention to the necessary consequence of accepting the petitioners' arguments.

If the petitioners are right in their Establishment Clause claim, it follows, we submit, that the resolution of these competing economic interests—*i.e.,* the interest of the employer in his "even-handed rule" and the interest of the religious employee in his job—can *never* be the subject of legislative action. If "reasonable accommodation" is an impermissible demand to make of an employer, it is hard to conceive how else Congress may deal with the problem. It must, then, leave it totally without legislative control.

Such an alternative places religious observance in a peculiarly vulnerable position that is at odds with the

"preferred" place that it occupies in our society. Congress may legislate to overcome irrational or unjustified impediments to the employment of racial minorities or those who are over-40 or those who are handicapped or have criminal records, but it may not, under the petitioners' approach, legislate to overcome unjustified barriers to the employment of religious observers. We think that such a limitation on legislative action would have been inconceivable to the draftsmen of the First Amendment and is totally at odds with the policies of the Religion Clauses.

To search for employment in an apologetic or self-demeaning manner is as degrading to a religious observer as it is to a black person or to a woman. The tenets the religionist holds sacred are as much a part of one's being as the color of one's skin or one's sex. And the pain of rejection for reasons of religious practice—unrelated to employment qualifications—is as stinging as that of any other form of irrational discrimination.

We are disturbed, therefore, by the tenor of the arguments that minority religionists do not merit the protections of the Civil Rights Act because religion is too subjective and ephemeral a quality, or because religion, unlike race or sex, is a self-imposed hardship. This is the insensitivity shown by one employer who glibly dismissed Sabbatarians as a "deviate religious practice." *The Wall Street Journal,* March 2, 1976, p. 5, cols. 1-2.

A. Section 701(j) Is a Means of Prohibiting Unjustified Religious Discrimination.

It seems to be generally agreed that Congress may constitutionally prohibit religious discrimination in

employment if the discrimination is directed at an employee's belief or mode of worship. Only conduct—affirmative observance or a refusal to act for reasons of religious scruple—is to be treated differently.[11] Section 701(j) is, we submit, a means of prohibiting discrimination when the purported reason therefor is an employee's conduct, but when the conduct really presents no objective basis for employment disqualification.

What does Section 701(j) do? It requires an employer who would refuse to hire or wishes to fire an employee to consider whether there is some way that the needs of the business may be reconciled with the religious needs of the employee. It says to an employer that he is discriminating on account of religion if he fails to hire or retain the observant employee unless he is able to specify a particular "undue hardship" to his business caused by "reasonable accommodation" to the observance.

There are, obviously, religious observances that have virtually no effect on an employer. Excusal of employees for a long lunch hour so they may attend full church services on Good Friday, permission to recite momentary brief prayers during the day, and authorization to wear a skullcap or other article of clothing required by religious belief are illustrative. Section

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[11] Many of the arguments made by petitioners on Establishment Clause grounds would apply to discrimination based on religious belief as well as observance and practice. For example, since Title VII prohibits discharge or refusal to hire based on *religious* belief, but not on *political* belief or *philosophical* belief, the prohibition would be a "breach of neutrality by discriminatory preference" or a "promotion of religious activity for its own sake." See Int'l Ass'n of Machinists Br., pp. 50-51.

701(j) disables an employer from terminating an employee because his conscience requires such minor adjustments. The reason why such termination would be improper is that the employer's assertion that the religious observance warrants dismissal is *unjustified*. What is really happening if an employee is dismissed for these reasons is that he is being arbitrarily treated —precisely because he adheres to a minority faith.

This case, along with those that have preceded it such as *Cummins* and *Dewey* v. *Reynolds Metals Co.*, 402 U.S. 689 (1971), concern observances which differ in degree, but not in kind, from those we have previously described. When a Sabbath-observer must, for reasons of conscience, be absent from his job between sundown on Friday and nightfall on Saturday, he obviously does not become incapable of performing any and every job that exists in our economy. Sabbath observers have filled and carried out with distinction some of the most responsible and demanding positions in private industry and government—including service as a federal judge and as law clerks to this Court. Whether the conscientious scruple against work on Saturday unduly impedes job performance must be judged by the individual task and its surrounding circumstances.

In its application to the case of the Sabbath-observer, Section 701(j) forces on the employer a genuine examination of his own business needs. It rejects superficially acceptable "even-handed" rules, and demands, instead, that the employer, and ultimately—if necessary—a court, decide whether there is substance to a claim that hiring or retention of the Sabbath observer will seriously impair a business operation.

This Court has noted, in another context, that the Constitution "nullifies sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson,* 307 U.S. 268, 275 (1939). Section 701(j) is a means of achieving this objective—or, in Mr. Justice White's words during the oral argument in *Cummins*—of "clear[ing] interstate commerce of religious discrimination which can reasonably be avoided."

B. Section 701(j) Does Not Accord an Impermissible "Preference" to Religion.

The principal argument made against the statute is that it grants "preferred treatment" to religious observers and thereby violates the Establishment Clause. See the question put by Mr. Justice Powell in the course of the *Cummins* argument.[12] This assertion grows out of the erroneous understanding of the law and its effect that has emerged from the briefs filed heretofore.

We demonstrate in the immediately preceding section that the objective of Section 701(j) is to bring reason to bear on particular employment decisions that

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[12] Mr. Justice Powell asked the Deputy Solicitor General (*id.* at pp. 42-43):

> What the [respondent] wants is not equal treatment. He wants preferred treatment. And it is a little curious to find the provision of the Statute, 701, that uses the term "discrimination" in a context that results in the argument being made here that because the employer accords equal treatment to Mr. Cummins the company that employs the employee is charged with discriminatory practice.
>
> The question I lead up to ask is: Whether or not in connection with your constitutional argument the employer is really not being compelled by law to accord a privilege, a benefit, to an employee because of his religious choice or preference?

affect religious observers. Because of the statute, religious unavailability on a particular day must be recognized as a legitimate ground for seeking accommodation; to this extent absence for reasons of conscience is given "preference" by the law over absence on less somber grounds. An employer may tell an employee who wants to go golfing on a Saturday morning that he must report for work instead, but he may not similarly sweep away the justification for unavailability given by a Sabbath-observer. But this is no more of a "preference" than a rule which would forbid a private employer from firing an employee who has a sound medical justification for a brief absence. Is the medical patient receiving a "preference" if, to prevent unjustified dismissals, a legislature were to require employees to engage in "reasonable accommodation" to the medical needs of their employees? Have the handicapped been given a "preference" by enactment of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, which requires substantial federal contractors to hire the handicapped?[13] The law on physical handicaps has been implemented by a regulation which, like Section 701(j), requires employers to engage in "reasonable accommodation" to the handicapped unless they can demonstrate that such accommodation "would impose an undue hardship on the conduct of the contractor's business." 41 CFR § 60-741.6(d).

Requiring very substantial reasons before an employment decision may be based on an employee's religious observance or practice is, for these reasons, not a "preference." It is neither more nor less than a recognition of the seriousness of such a ground of unavailability and an acknowledgment that it may not be brushed aside.

[13] Laws have also been enacted in 23 States protecting handicapped workers. In 19 of these States, the same prohibitions that apply to racial discrimination apply to discrimination against the handicapped. Schlei & Grossman, Employment Discrimination Law 226 nns. 38 & 39 (1976).

But our argument goes beyond this proposition. We believe that even if this approach can be said to constitute special treatment for religious observance, it is appropriate in these circumstances for the two reasons set out below:

(1) *Compensation for inequalities imposed upon minority faiths.*—The dilemma encountered by a Sabbath-observer whose employer insists that he be available on Saturdays is traceable, in no small part, to the majority's acceptance of Sunday as the most customary day of rest. And the selection of Sunday, as this Court has recognized, was originally "motivated by religious forces," with Sunday closing laws having "had their genesis in religion." *McGowan* v. *Maryland,* 366 U.S. 420, 431, 445 (1961). The law requiring a single day for uniform closing of businesses may now be justified on the secular grounds set out in *McGowan,* but no one can deny that the selection of Sunday as that day is attributable to its status as "a day of particular significance for the dominant Christian sects." 366 U.S. at 445.

The extent to which it has become universally accepted that labor cannot be mandated by a private employer on Sundays is demonstrated by a premise of this Court's opinion in *Sherbert* v. *Verner,* 374 U.S. 398 (1963). Explaining how South Carolina's unemployment compensation system discriminated against Sabbatarians, this Court quoted Section 64-4 of the South Carolina Code which provides that even in times of national emergency, when textile plants may

operate on Sundays, "no employee shall be required to work on Sunday . . . who is conscientiously opposed to Sunday work; and if any employee should refuse to work on Sunday on account of conscientious . . . objections he or she shall not jeopardize his or her seniority by such refusal or be discriminated against in any other manner." This Court assumed, in deciding the *Sherbert* case, that such a law was plainly valid—even without provisions for "reasonable accommodation" or an exception for "undue hardship"—and would prevent discharges for refusals to work on Sundays. But this case concerns that very question, as applied to an adherent to a minority faith under a more general law that protects *all* religions, *all* days of rest, and *all* forms of observance.[14]

In this vein, Section 701(j) gives a Sabbatarian rights that compensate for the disability he suffers by not belonging to the majority faith.[15] In *Braunfeld* v. *Brown,* 366 U.S. 599 (1961), the entire Court recognized that a local jurisdiction would be acting more wisely (and, in the view of the *Braunfeld* dissenters, in a constitutionally mandated manner) if it placed Sabbatarian businessmen on a par with Sunday observers by granting legislative exemptions from Sunday Closing Laws. Section 701(j) is the equivalent

[14] The EEOC's implementation of the Civil Rights Act has extended the term "religion" to include any belief held with the strength of traditional religious convictions. See EEOC Dec No. 71-779, 1973 CCH EEOC Dec. 4304 (1970). Hence there is no possibility of discrimination among various faiths. See, *e.g., Welsh* v. *United States,* 398 U.S. 333 (1970). And the statute has been applied to protect atheists against "forced religious conformity" in private employment. *Young* v. *Southwestern Savings & Loan Ass'n,* 509 F.2d 140 (5th Cir. 1975).

[15] It is relevant to note, in this regard, that among eight holidays prescribed by the labor contract between TWA and the union, two are Christian religious holidays—Good Friday and Christmas Day. R. 216

of such exemptions *for employees.* Sunday Closing Laws affect the labor force indirectly, by compelling the owners of retail establishments—management—to remain closed on the day of rest selected by the majority faith. A Sunday Closing Law obviously cannot provide direct protection for the religious rights of a Sabbatarian employee; an exemption protects only the Sabbath-observing storeowner. But to give a minority employee the equal treatment to which he is entitled in fairness and justice (and, we believe, in the implementation of "free exercise values"), a law such as Section 701(j) is a necessity.

(2) *Special protection for religious liberty.*—Although we believe that this law is not a "preference" for the reasons stated above, we do not shy away from the proposition that the implementation of one's religious convictions is entitled to special protections—whether against state action or private infringement. Religious belief and practice occupy high places in our nation's scale of interests. One commentator has said that "religious or conscientious values frequently represent an idealism which serves a valuable function in society even though the idealist's conclusions may be rejected." Clark, *Guidelines for the Free Exercise Clause,* 83 Harv. L. Rev. 327, 337 (1969). The same writer has also observed that "violation of a man's religion or conscience often works an exceptional harm to him which, unless justified by the most stringent social needs, constitutes a moral wrong in and of itself . . . . [T]he cost to a principled individual of failing to do his moral duty is generally severe, in terms of supernatural sanction or the loss of moral self-respect." *Ibid.*

In *Gillette* v. *United States,* 401 U.S. 437, 453-454 (1971), this Court spoke of the nation's "happy tra-

dition of avoiding unnecessary clashes with the dictates of conscience." On this ground, it concluded that "benevolence" in the area of religion was entirely consistent with the governing constitutional principle of "neutrality."

Religious concerns are unusual interests of extraordinary fragility. The framers of the Constitution were not indifferent to them nor were they neutral on the survival of religion. So perceptive an observer as Alexis de Tocqueville noted that while he could "not know whether all Americans have a sincere faith in their religion," he was "certain that they hold it to be indispensable to the maintenance of republican institutions." 1 Tocqueville, *Democracy in America* 316 (Vintage 1945). It is most unlikely, on this view of the importance of freedom of religion, that the framers intended to remove totally from the power of Congress any authority to protect the practice of religion from private inhibition or suppression. "Free exercise values" are, we believe, a proper subject for Congressional protection.

On this account, we believe that the Establishment Clause is not violated when Congress acts reasonably to *shield* religion and those who practice it from the effects of governmental or private action that would, absent such legislation, have the effect of infringing religious belief or practice. In such circumstances, the now-famous tripartite test of "purpose," "effect" and "entanglement" is simply inapplicable. When a governmental agency is granting benefits or establishing special programs—as it did in the cases involving released time, school prayers and bible reading, and financial assistance to private schools—the ultimate constitutional question is whether the Con-

stitution's ban against "sponsorship, financial support and active involvement" (*Walz* v. *Tax Commission,* 397 U.S. 664, 668 (1970)) has been violated by the form of the program or the regulation. But when Congress acts in a way that is merely defensive—that is designed to give religious belief and practice no more than breathing space in which to survive—the constitutional test should be whether the means is legitimately and rationally calculated to achieve the permissible end.

Leaving to one side the question of "state action" (which, for reasons stated below, pp. 30-31, *infra,* should not make a critical difference), the many instances in which this Court has upheld special legislative exemptions for religionists proves our point.[16] There seemed to be general agreement, for example, at the time of *Braunfeld* v. *Brown,* 366 U.S. 599 (1961), that an exemption for religious Sabbatarians from the operation of Sunday Closing Laws was constitutional, even though—by the Court's own reasoning—Sabbath-observers who keep their shops open on Sunday might thereby be given "an economic advantage over their competitors who must remain closed that day." 366 U.S. at 608-609.

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[16] Almost 60 years ago in the *Selective Draft Law Cases,* 245 U.S. 366, 389-390 (1918), Chief Justice White, referring to the conscientious objector provisions, said for a unanimous Court:

> And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof, repugnant to the 1st Amendment, resulted from the exemption clauses of the act to which we at the outset referred because we think its unsoundness is too apparent to require us to do more.

Various exemptions granted to religionists by court order or legislative action fall into the same category. In *Sherbert* v. *Verner,* 374 U.S. 398 (1963), for example, this Court determined that an exemption from compensation ineligibility was constitutionally required for Sabbatarians who are unable to accept a job requiring Saturday work because of their conscientious scruples; the Court explicitly rejected the notion that such an exemption would be "fostering the 'establishment' of the Seventh-day Adventist religion in South Carolina." 374 U.S. at 409. Indeed, even the late Mr. Justice Harlan, who dissented in *Sherbert,* objected only to the ruling that an exemption was *constitutionally mandated.* 374 U.S. at 420. He noted his view "that at least under the circumstances of this case it would be a permissible accommodation of religion for the State, if it chose to do so, to create an exception to its eligibility requirements for persons like the appellant." 374 U.S. at 422.

A similar approach was followed in *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972). Upon concluding that the Free Exercise Clause of the First Amendment requires Wisconsin to exempt Amish parents from certain provisions of the State's compulsory education law, the Court disposed, in a footnote, of the kind of claim made here. 406 U.S. at 234-235, n. 223.[17]

[17] Legislative exemptions for religionists have also been frequently enacted and frequently sustained. The Prohibition Act contained an exemption for the use of sacramental wine (41 Stat. 308), and the constitutionality of such an exemption was sustained in *People* v. *Marquis,* 291 Ill. 121, 125 N.E. 757 (1919). The federal tax laws now contain an exemption from the payment of Social Security taxes for members of the Amish sect. 26 U.S.C. § 1402(h). Special statutory provisions for those having religious objections to abortions or other terminations of pregnancy (*e.g.,* N.Y. Civ. Rights Law § 79-i (McKinney Supp. 1975)) or for those having religious objections to autopsies (*e.g.,* Md. Code Ann., art. 22, § 6, as amended 1976) have recently been acted. See generally Shetreet, *Exemptions and Privileges on Grounds of Religion and Conscience,* 62 Ky. L.J. 377 (1974).

As to each of these exemptions, as with the prevalent Sabbatarian exemptions to Sunday laws (*e.g.,* 366 U.S. at 553-559), it could be argued—as it is being argued here—that the "primary purpose and effect" of the particular provisions is to aid religious practice. On its face, that is plainly true. Obviously, every protection for religious liberty somehow "aids" or "furthers" religious activity. "It cannot be ignored that the First Amendment itself contains a religious classification." *Welsh* v. *United States,* 398 U.S. 333, 372 (1970) (White, J., dissenting). But this Court recognized in *Yoder* that there is a constitutional difference between the active support that is prohibited by the Establishment Clause and the essentially defensive protection granted by statutes such as this one to permit religious observances to be performed without the kind of impediment that might be caused by adverse employment consequences.

For the reasons stated above, we believe that the constitutionality of laws such as Section 701(j) under the Establishment Clause should not be measured by the now-hallowed "tripartite" test applied when a form of state financial assistance to religion or an official religious exercise is authorized, sponsored or commanded by State law. Rather, the proper test should be whether the enacted legislation is a reasonable means of protecting the free exercise of religious beliefs and practices.

C. Section 701(j) Obligates an Employee to Cooperate with His Employer's Efforts to Make a "Reasonable Accommodation."

Nothing in the law or in its legislative history entitles an employee whose religious practice conflicts with an employer's general rule to demand unjustified benefits or preferences. The statute requires not merely accommodation; it qualifies the employer's duty with the word "reasonable." No employee may utilize his Sabbath observance as a way of getting "52 days off with pay." Nor may any employee refuse to cooperate with an employer's attempts at accommodation; he would, in such circumstances, be acting unreasonably. See Note, *Accommodation of an Employee's Religious Practices Under Title* VII, 1976 U. Ill. L. Forum 867, 876-879. But the interesting historical fact is that, notwithstanding the expressed fears that Section 701(j) might be used as a pretext by malingerers, we have found no reported cases in which the employee claiming rights under the Act refused to make himself available for work on other days or refused to accept a cut in pay if less working hours was the only available option.

D. Section 701(j) Imposes the Burden of Accommodating and Explaining on the Employer Because He Has the Facts.

Some members of this Court are apparently concerned over the fact that the Act assigns to the employer the "burdens" of accommodating to an employee's religious practice and of explaining, if no accommodation can be devised, why he is unable to do so. See note 8, *supra*. These are appropriate assignments of obligation based not on fault but the fact that only the employer has the *information* necessary to carry out these duties.

We have previously noted that the duty to accommodate requires the employer to make a genuine examination of his business operation to determine whether a Sabbath-observer, or any other religious practitioner, is truly unable to work at a particular position without "undue hardship" to the business. *Only* the employer has the total perspective to know what can be done in the way of work reassignment or adjustments in salary schedules. The employee in these cases may occasionally be in a position to suggest a working arrangement—and we agree that he is under an obligation to be cooperative in this manner—but it would be unfair to all parties concerned and would infringe on employer's management prerogatives to expect the employee to devise and implement the statutory accommodation. He is not privy to information the employer has on the availability of his employees, on the flexibility of his production schedule, on the economic consequences of various forms of readjustment, and on other minutiae of the business operation.

The employer's burden to explain is analogous to the duty an employer has under the sex discrimination provision of Title VII and the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.*, which requires him to prove that limiting a job to a particular sex or to a particular age bracket are "bona fide occupational qualifications." The courts have held that an employer must prove, in a sex discrimination case, that "the *essence* of the business operation would be undermined by not hiring members of one sex exclusively." *Diaz* v. *Pan American World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971); see *Weeks* v. *Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969). The same principle has

been applied recently to age discrimination. *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235 (5th Cir. 1976), and Section 701(j) imposes substantially the same burden in cases involving employees' religious practices and observances.

E. Other Employees—Even if Covered by a Labor Contract—Must Make Adjustments of the Kind Customary in an Employment Relationship.

It is argued in this case that an accommodation to the respondent's religious observance would have created a hardship for some non-Sabbatarian employee who would be required to work on the "undesired Saturday" (Int'l Ass'n of Machinists Br., p. 31). For reasons stated more fully in a later section of our brief (pp. 32-34, *infra*) and explored in the decision of the court of appeals (A. 256-259), we believe that an accommodation could have been worked out which would not have imposed any appreciable burden whatever on other employees at the TWA facility. And in many other situations where "hardship" is alleged, a close examination of the facts demonstrates that, without inconveniencing any other employee, an accommodation can be devised for the employer.[18]

We deal in this section of our brief, however, with the assumed premise that, in certain circumstances, an employee not regularly assigned to a Saturday shift and not voluntarily wishing such an assignment may have to substitute for a Sabbath-observer. The Constitution does not prevent Congress from requiring an employer to make such an involuntary assignment.

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[18] In *Cummins*, for example, the particular employee's presence on Saturday was unnecessary. The evidence indicated that the planning aspect of his supervisory duties could be accomplished with additional effort on Friday and that immediate supervision could be done by the employee overseeing the neighboring section.

We note initially, in this regard, that the disadvantage of "undesired Saturday" work may often be overcome by the greater disadvantage of far more undesirable *Sunday* work—which may clearly be assigned to the Sabbath-observer as part of any "reasonable accommodation." The employee who is asked to work on Saturdays in place of the Sabbatarian may, by the same token, be exempted from any Sunday assignments. Particularly in an operation which works on a regular seven-day week (such as the TWA overhaul base), it is highly improbable that employees would not prefer a Saturday to a Sunday assignment.

Moreover, the inconvenience of a transferred employee may be substantially mitigated by a payment of overtime wages. Whether the incremental salary must be paid by the Sabbatarian employee or by the employer (see A. 258) is not an issue that has to be resolved in this case. The point is that the seeming disadvantage assigned to the substitute for the Sabbath-observer is not all pain and no profit. Indeed, it is hard to believe that if an exemption from Sunday work or overtime wages were offered, the company would be unable to find anyone willing to take the Sabbatarian's Friday evening or Saturday shift.

Beyond these very practical considerations—which dispose, we submit, of an overwhelming majority of the cases—lies the ultimate theoretical question: Is the First Amendment violated if an employer must assign an unwilling non-Sabbatarian to fill in the Saturday shift of a religious observer? Surely far less, we submit, than it is violated by the assignment to military duty of a non-conscientious objector to take a place on the firing line that would otherwise be occupied by the religiously motivated pacifist. "Our happy tradition" of accommodating to conscientious scruples in a "Na-

tion of enormous heterogeneity in respect of political views, moral codes and religious persuasions" (*Gillette* v. *United States,* 401 U.S. 437, 453, 457 (1971)) leads us to sustain legislative imposition of some burdens on private citizens in order to enable religious belief and practice to survive. Occasional adjustments in work schedules are well within the range of such permissible burdens and are far less substantial than the burden that results from a religious exemption from duty in battle.

The nonreligious employee's interest in not working on Saturday does not take on added legal significance if it is part of a "seniority clause" in a collective-bargaining agreement. If an individual employee who works in an unorganized plant may be required to work involuntarily on Saturdays because a more junior employee has religious scruples against doing so, there is no reason why an employee in a plant covered by a labor contract may not be assigned a similar duty. Is the contract between the employer and the representative of a majority of its employees entitled to greater weight than the express or implied terms of an individual employment contract?

The proper rule of law is that the employer is not free to bind himself by *any* contract—whether in collective or individual form—which would appear to disable him from hiring or retaining any employees against whom he may not discriminate under the law. The proposition that an employer may be required to accommodate to a religious observance only if he is "contractually free" to do so (Int'l Ass'n of Machinists Br., p. 28), but that he and the union representing his employees may, by a written agreement, override that statutory directive is plainly wrong.

Courts have said on many occasions that "[t]he rights assured by Title VII are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert." *Robinson* v. *Lorillard Corp.,* 444 F.2d 791, 799 (4th Cir.), *cert. denied,* 404 U.S. 1006 (1971); see, *e.g., Williams* v. *Norfolk & W. Ry.,* 530 F.2d 539 (4th Cir. 1975); *United States* v. *Navajo Freight Lines, Inc.,* 525 F.2d 1318, 1323-1324 (9th Cir. 1975). In *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 757-762 (1976), this Court reviewed the legislative history of Section 703(h) of the Civil Rights Act—which protects any "bona fide seniority or merit system"—and concluded that the statutory shield did not express Congress' wish "to modify or restrict relief otherwise appropriate." 424 U.S. at 761-762. A perceptive law review analysis of the problems arising in the implementation of Section 701(j) has observed that seniority systems "are less a source of religious discrimination than a limitation on methods of accommodation. . . ." Note, *Accommodation of an Employee's Religious Practices under Title VII,* 1976 Univ. of Ill. L. Forum 867, 887. Hence the principles announced in *Bowman* as applicable to relief for discrimination—rather than to whether illegal discrimination exists—should apply in this case, and the existence of a seniority system should afford no basis for denying to an observant employee the kind of accommodation that an employer might have available.

We note, finally, that the kind of schedule adjustment being required here is the sort that is customary in ordinary business operations. No one is being laid off or permanently reassigned in violation of a seniority clause. Rather, an employee who might be able to "bid" out of Saturday work is required to be available

on that day—much as he might be if the more junior employee were incapacitated or were otherwise unavailable for reasons that are generally accepted. Religious conviction is entitled to no less respect by employers and employees than medical necessity. And if Congress enacts into law the duty to accommodate to religious conviction, that legislative judgment is reasonable and permissible under the First Amendment.

F. Congress' Authority to Legislate is Not Affected by the Fact That Private, Rather Than Governmental, Discrimination Is Involved.

During the oral argument in *Cummins,* both the Court and counsel laid substantial stress on the difference between Section 701(j) which applies to private employees and a law that deals only with government employees. See note 10, supra. In fact, the Civil Service Commission has adopted a regulation (5 C.F.R. § 713.204(g)) that closely parallels Section 701(j), and that refers explicitly to the obligation to accommodate a Sabbath-observer by substituting for him "another qualified employee." The regulation declares that it is every government agency's duty to

> Make reasonable accommodations to the religious needs of applicants and employees, including the needs of those who observe the Sabbath on other than Sunday, when those accommodations can be made (by substitution of another qualified employee, by a grant of leave, a change of a tour of duty, or other means) without undue hardship on the business of the agency. If an agency cannot accommodate an employee or applicant, it has a duty in a complaint arising under this subpart to demonstrate its inability to do so.

A law dealing with private employees, enacted in the exercise of Congress' authority under the Commerce Clause, is no less sound constitutionally than a law regulating government employees. To be sure, as petitioner's counsel emphasized in *Cummins,* the Free Exercise Clause operates directly against government agencies and they may, accordingly, have a heightened constitutional obligation to promote "free exercise values." On the other hand, the Establishment Clause is, by the same token, more directly involved when government employment is at issue. If a private employer shifts an unwilling employee to Saturday work as one possible accommodation to a Sabbath-observer, it is more difficult to maintain that the transfer is an "establishment" of the Sabbatarian's religion than if a government official makes such a decision. Consequently, to the same degree that a governmental accommodation may be deemed *more* permissible because cause of the Free Exercise Clause under the petitioner's constitutional theories, it should be *less* permissible under the Establishment Clause.

In fact, we submit, there is no substantial difference between government and private employment for purposes of legislative authority. Congress may act as freely to protect the free exercise of religion when it seeks, under the Commerce Clause, to remove religious belief or practice as a factor in private employment as when it attempts, under its authority over federal employment, to remove it as a factor in government hiring.

Moreover, totally private discrimination on the basis of age is now prohibited by federal law. See 29 U.S.C. §§ 621-634; Note, *The Age Discrimination in Employment Act of 1967,* 90 Harv. L. Rev. 380 (1976). In

Massachusetts Board of Retirement v. *Murgia,* 96 S. Ct. 2562 (1976), this Court held that advanced age does not define a "suspect class" under Equal Protection standards because there is no history of "purposeful unequal treatment" of the aged or subjection of the aged "to unique disabilities on the basis of stereotyped characteristics," and because the aged are not a " 'discrete and insular' group . . . in need of 'extraordinary protection from the majoritarian political process.' " 96 S. Ct. 2566-2567. Minority religions, on the other hand, do satisfy these standards. Consequently, Congress might even have authority under the Equal Protection principle, as incorporated into the Fifth Amendment, to protect minority religionists.

II

ACCOMMODATION WOULD HAVE IMPOSED NO "UNDUE HARDSHIP" ON THE EMPLOYER

We turn now, briefly, to the facts of this case. It involves an individual employee who "was willing to work any hours, take any combination of Days Off, and work any shift as long as he did not have to work between Sundown Friday and Sundown Saturday" (R. 36). Given this wide availability, the question is whether the employer and the union had a statutory obligation—singly or together—to work out some way under which his employment could continue.

The court of appeals suggested various accommodations—amply sustained by the record—that would have involved no or little inconvenience to other employees. *First,* the plaintiff could have been put on either a four-day or six-day week (A. 256). The first of these alternatives would have complied with the labor con-

tract; the second was objected to by the union because it was assertedly in violation of its 40-hour-per-week clause. *Second,* the employer could have covered plaintiff's shift by giving overtime pay to another employee who would be asked to fill in for the plaintiff (A. 256-257). This had been rejected because it might have involved an added expense. But the mere fact that an accommodation designed to eliminate religious discrimination would be more costly does not render it constitutionally impermissible. Eliminating discrimination in conditions of employment on account of sex might incidentally, for example, result in increased cost to the employer,[19] but that would not justify different treatment for male and female employees. The same rule should apply to employees of majority and minority faiths.

Moreover, the employer totally failed to consider whether the plaintiff might be required to take a salary adjustment in order to pay his substitute. Instead, the approach taken was a wooden one, in which the employer viewed itself as bound by all the literal terms of the labor contract and the union refused to be flexible in any way in its implementation.[20]

The plaintiff was, therefore, "whipsawed" between his employer and his union. The employer said that it would agree to anything that the plaintiff and the un-

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[19] In *General Electric Co.* v. *Gilbert,* 97 S. Ct. 401 (1976), for example, this Court noted, but did not approve of, a "cost-differential" defense. See 97 S. Ct. at 406 & n. 11.

[20] The union letter reporting on the plaintiff's difficulties explained the refusal to waive the 40-hour-a-week clause for the plaintiff's own work by saying (R. 36): "Of course, we know what would happen to our TWA-IAM Agreement if we made an exception to our '40 hours a week' clause in this case."

ion could work out, and the union shifted to the employer the duty of devising an accommodation.

This record concerns an employer who views the payment of overtime to a substitute as an unacceptable accommodation to an employee's religious beliefs and a union that views waiver of the overtime clause (even, apparently, when consented to by the employee) as an unacceptable course. Each of the parties to the agreement sticks to its letter, and the only one who loses is the employee who has sincere religious convictions and is prepared to work any day but his Sabbath.

This, we submit, is plainly not what was intended by the EEOC regulations and the Congressional definition in Section 701(j) of the Civil Rights Act of 1964, as added in 1972. Both provisions cast the test in terms of "undue hardship" not in terms of "added expense" or in terms of "departures from usual practices." The legal obligation cast upon a private employer and a union (both of whom are expressly covered by Title VII of the Act) is to engage in hiring practices which will not have the effect of excluding religious believers on account of their religious practices. The "one-two punch" of TWA's refusal to pay overtime to a substitute and the Union's refusal to waive the overtime clause (even as applied directly to the religious believer) is to exclude Sabbath observers from TWA's employment rolls. Congress has said this is permissible only if TWA and the Union are able to show specificially that there is "undue hardship" caused TWA's business by an accommodation. No such showing was made in this case.

What Congress and the EEOC doubtless contemplated when they included the "undue hardship" language in the statute and the regulations was the case

of an employer with a small number of employees, all or nearly all of whom are needed on weekends or on days when religious holidays may occur. It surely did not intend to exempt an employer with a mammoth staff of employees who establishes rigid rules regarding work schedules because individual adjustment is bothersome and then invokes the rigidity of his own rules as a basis for denying employment to a conscientious believer. If the excuse used here by TWA and the Union were legally sufficient, all large employers would be able to escape the effect of Section 701(j) by citing their religiously "neutral" rules. The very purpose of Section 701(j) was to provide protection for Sabbath-observers with respect to ostensibly "neutral" rules by requiring accommodation.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

COLPA Report on Implementation by New York State Division of Human Rights of "Reasonable Accommodation" Requirement in Three Industries with Time Demands*

Introduction

For many years, employment positions in industries operating on a six or seven-day a week basis have posed particular problems for Sabbath observers. Weekend work is never favored, and thus rotating shifts or requiring new employees to work weekends are common practices. The industries presenting the greatest difficulty are hospitals, public utilities and transportation systems, and large retail department stores. Through a series of proceedings brought in the New York State Division of Human Rights and discussions with employers a pattern has emerged indicating that the problem can be met if reasonable and genuine efforts are made by employers.**

A. *Hospitals*

The provision by hospitals of patient-care on a twenty-four hour a day, seven-day a week basis clearly requires personnel available at all times. For many years, hospital employment, in professional and non-professional capacities, was generally closed to Sabbath observers. As late as March 27, 1975, the New York State Division of Human Rights dismissed a Sabbath-observer complaint filed by a food service worker. (*Negron* v. *Queen's Children's Hos-*

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* This report was prepared by Dennis Rapps, Esq., Executive Director of the National Jewish Commission on Law and Public Affairs ("COLPA") with the assistance of Joseph S. Allerhand and Michael E. Zuller, second-year law students at Georgetown University Law Center.

** Agreements or documents referred to throughout this report are contained in the case files of the cases cited.

pital, New York State Division of Human Rights Case Nos. Ic-GCR-841-75, GCR-36613-75.) The ground on which the dismissal was based typifies the problem. Accepted was the unexamined premise that since service is provided on weekends, availability a. all times is a bona fide condition of employment. As the result of the case of *Eizik* v. *Good Samaritan Hospital,* Case No. CR-35677-74, New York State Division of Human Rights, Appeal No. 2594 New York State Human Rights Appeal Board, confirmed, Appellate Division, 2nd Dept., 386 N.Y. S. 2d 1016 (1976), hospitals are now required to demonstrate that the job-holder would be personally indispensible on the period of the observer's Sabbath to adequate patient care in order to justify refusal to hire an otherwise qualified observer. A typical new hiring policy of hospitals is contained in a conciliation agreement entered into in *Dornbush* v. *Long Island Jewish Hillside Medical Center,* Case Nos. Ie CR-1117-76, CR-40993-76, New York State Division of Human Rights, a case involving a nursing position. The pertinent provisions are:

> All applicants for employment will be considered strictly on the basis of their qualifications and without regard to their race, creed, color, national origin, age, sex, disability or marital status.
>
> All employees will be granted equal terms, conditions and privileges of employment without regard to their race, creed, color, national origin, age, sex, disability or marital status.
>
> Sabbath observers will be considered for all positions and, if hired, their sabbath observance accommodated unless (1) the position in question is one where the person holding such position must be personally available for duty whenever needed or (2) the personal presence of the person holding the position in question—or the people holding such class of positions—is regularly essential during the period of the person's sabbath or other holy day.

> Respondents will inform all supervisory personnel in writing that sabbath observers will be considered for all Registered Nurses positions and, if hired, will be accommodated as required by the Human Rights Law.

See also *Pollak* v. *Kings County Hospital Center,* Case No. CR-35841-74, New York State Division of Human Rights (dietitian); *Westrich* v. *Hospital for Cancer and Allied Diseases,* Case No. CR-35853-74, New York State Division og Human Rights, appeal pending (nursing student-aide); *Gross* v. *St. Vincent's Medical Center,* Case No. CR-34252-74, New York State Division of Human Rights, appeal pending (nurse); *Newman* v. *Columbia Presbyterian Hospital,* Case No. CR-2345-75, New York State Division of Human Rights (X-ray technician); *Fruchter* v. *New York Hospital,* Case No. CR-37892-75, New York State Division of Human Rights (nursing aide); *Hecker* v. *Kingsbrook Jewish Hospital Center,* CR-41495-76, New York State Division of Human Rights (office worker) and *Cruz* v. *Hillcrest General Hospital,* Case No. C-42644-76 New York State Division of Human Rights (nurse).

B. *Public Transportation and Utilities*

1. Public transportation agencies generally provide service seven day a week. Most employment in such industries is generally governed by collective-bargaining agreements regarding shift assignments. The New York City Transit Authority for many years asserted that it could not hire Sabbath observers because of these contracts. The Division took the position that, regardless of any contractual provision, New York law does not permit denial of employment opportunity to the observant unless the holder of a position applied for was personally essential during his or her Sabbath period. See *Waxstein* v. *New York City Transit Authority,* Case No. CR-27133-72, New York State Division of Human Rights, Appeal No. 1813, New York State Human Rights Appeal Board, *affirmed,* 360 N.Y.S. 2d

844 (2nd Dept. 1974), *leave to appeal dismissed*, 36 N.Y. 2d 872 (bus driver); *Gold* v. *New York City Transit Authority*, Case No. GCR-28863-72, New York State Division of Human Rights (token clerk); and *Kramer* v. *New York City Transit Authority*, Case No. GCR-31952-73, New York State Division of Human Rights (maintenance worker in power plant). As the result of such cases the Authority, with the concurrence of the involved unions, has adopted a policy that "no adverse action may be taken against any employee who in accordance with the law absents himself from work because of his observance of a sabbath or other holy day in accordance with the requirements of his religion." Further, canvass letters sent to persons eligible for employment and test announcements were revised to reflect this policy. See *Waxstein*, *Gold* and *Kramer*. See also *Clement* v. *New York City Transit Authority*, Case No. CR-37788-75, New York State Division of Human Rights.

2. Similarly, public utilities have policies of accommodation. AT&T "long lines" has a policy that "any applicants for employment who indicate that they are Sabbath Day observers and thus unable to work on the sabbath should not be refused employment for that reason and should be informed that, if hired, appropriate arrangements will be made . . ." See *Dembinsky* v. *American Telephone and Telegraph Co.*, Case No. CR-25640-71, New York State Division of Human Rights; *Smith* v. *New York Telephone Company*, Case No. CRF 25906-71, New York State Division of Human Rights and *Weil* v. *New York State Thruway Authority*, Case No. I-V-E C-1673-76E, New York State Division of Human Rights.

C. *Major Retail Stores*

One of the businest days for large department stores is Saturday—particularly if Sunday closing laws are in effect. Traditionally, stores have therefore asserted that they were justified in refusing employment to Sabbath-observ-

ers who would not work on Saturdays. In a number of cases this position was taken by employers but later there were concessions that adjustments could reasonably be made and policies of accommodation adopted. See *Assaraf* v. *Lord & Taylor*, Case No. CR-27961-72, New York State Division of Human Rights (beautician); *Gottesman* v. *Fooderama Supermarket, Inc.*, Case No. CR-28985-72, New York State Division of Human Rights (produce clerk); *Klein* v. *Tiffany & Co.*, Case No. CR-31781-73, New York State Division of Human Rights (stock clerk); *Kallus* v. *W & J Sloane Furniture*, Case No. CR-33573-74, New York State Division of Human Rights (personnel trainee). See also *Friedman* v. *Alexanders Department Store*, Case No. CR-30170-73, New York State Division of Human Rights (special need in particular case but generally accommodation is made).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

LARRY G. HARDISON,
Respondent.

INTERNATIONAL ASSOCIATION OF MACHINISTS,
Petitioner,

v.

LARRY G. HARDISON,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 75-1126 and 75-1385

TRANS WORLD AIRLINES, INC.,
Petitioner,
v.
LARRY G. HARDISON,
Respondent.

INTERNATIONAL ASSOCIATION OF MACHINISTS,
Petitioner,
v.
LARRY G. HARDISON,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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MOTION FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court

Pursuant to Rule 42(3) of the Rules of this Court, the Equal Employment Advisory Council respectfully moves this Court for leave to file the accompanying

brief as *Amicus Curiae* in support of the position of the petitioners in this case. In support of this motion, the above-named Council shows as follows:

1. This motion for leave to file is necessary under Rule 42(3) because counsel for the respondent has advised that consent for the filing of this brief would not be granted. Counsel for the petitioners have given their written consent, which are on file with the Clerk of this Court.

2. The Equal Employment Advisory Council ("EEAC") is a voluntary, non-profit association, organized as a corporation under the laws of the District of Columbia. Its membership includes a broad spectrum of employers from throughout the United States, both labor organized and unorganized, including individual employers, trade and industry associations. The principal goal of EEAC is to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices.

3. Because of this interest, the EEAC has sought and been granted permission to file briefs as *amicus curiae* in other matters before this Court, including *Guy* v. *Robbins & Myers, Inc.* (Docket No. 75-1264 and 75-1276); *T.I.M.E.-D.C., Inc.* v. *Rodriguez* (Docket No. 75-672); and *East Texas Motor Freight System, Inc.* v. *Jesse Rodriguez, et al.* (Docket No. 75-718).

4. The questions presented for review in this case raise issues of substantial importance to the *Amicus Curiae* and the outcome thereof will have a major

impact upon employers throughout the country. As such, the members of EEAC have a direct interest in the issues presented for the Court's consideration in this case, as to the constitutionality of the religious accommodation requirement in Title VII, the nature and scope of any lawful duty to accommodate, and its practical effect upon legitimate employer business practices and collective bargaining agreements.

5. The *Amicus* filing this motion has broad knowledge concerning the application of the religious accommodation proviso involved in this case to employers generally. Because of this knowledge, the *Amicus* EEAC is uniquely situated to brief the court on the practical as well as legal aspects of the issues presented here.

WHEREFORE, it is respectfully moved that the above-named Council be granted leave to submit the accompanying brief as *Amicus Curiae* in this case.

Respectfully submitted,

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On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

STATEMENT OF THE CASE

This case is before the Court on appeal from a decision of the Court of Appeals for the Eighth Circuit holding that Petitioner TWA violated Title VII on the grounds of religious discrimination when it discharged Respondent Hardison for refusing to work Saturdays because it conflicted with his observance of the Sabbath. The Court held there was a duty on the employer's part under Section 701(j) to accommodate work assignments and the schedules of other employees to the religious practices of Respondent.

The facts as set forth in the brief of the petitioners in this case are sufficient for the *Amicus* to present its position as a friend of the Court on the appeal. EEAC's only additional observation is that there appears to be a serious difference between the facts as found by the District Court and those set forth in the opinion of the Court of Appeals as to the extent to which Petitioner TWA endeavored to accommodate Respondent Hardison. We leave to TWA to urge its arguments upon the Court as to the proper scope of judicial review of the District Court's findings under Rule 52(a) at the Circuit Court level as set forth in their petition for *certiorari*, noting, however, agreement with their general position that the appellate court should not engage in *de novo* consideration where there has been a hearing or trial in the district court.

THE QUESTIONS PRESENTED

1. Whether the duty of religious accommodation imposed under Section 701(j) of Title VII compels

employers and labor organizations to take action inconsistent with the provisions of *bona fide* negotiated collective bargaining agreements?

2. Does the requirement of Title VII providing preferential treatment for religionists by requiring an employer to accommodate business operations to conform to his employees' personal observance of individual religious practices violate the Establishment Clause of the First Amendment?

SUMMARY OF ARGUMENT

This case is before the Court after two previous attempts to resolve the complex constitutional issues posed both ended in the Court being deadlocked.[1]

The present appeal presents the matter in a somewhat broader vein in that, in addition to the constitutional issue, it also focuses upon the impact of the Title VII religious accommodation proviso—42 USC 2000e(j)—upon collective bargaining agreements and the national labor policy. The Court below appears to have failed to grasp the significance of this issue as well as the true extent of the constitutional impediment involved. The present case should therefore resolve the long-standing statutory, policy, and constitutional questions that have surrounded efforts to compel employers to rearrange their business and work practices in order to meet the congressional demand for accommodation of the

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[1] *Dewey* v. *Reynolds Metals Co.*, 402 U.S. 689, 3 FEP Cases 308 (1971) and *Parker Seal* v. *Cummins*, —— U.S. ——, 13 FEP Cases 1178 (1976).

personal observance of religious practices by employees.

While Title VII, in its basic form, was a major piece of social legislation designed to bring about *uniformity* of treatment for all persons in the Nation's work force, the 1972 religious accommodation amendment poses something of a dilemma. For the amendment, as construed by the court below, goes farther and instead fosters a medium of preferential consideration that works to the detriment of the majority of employees who are not seeking special working conditions because of their religious affiliations.

Compounding the matter is the problem of the employer who has entered into a collective bargaining agreement under the Railway Labor Act or National Labor Relations Act, as it also vainly seeks to comply with the accommodation mandate in Section 701(j). This situation has brought about serious conflicts between various of the Nation's labor policies which the Congress has apparently left for the Court to sort out.

The Court is initially urged to hold that the Court of Appeals has "overdefined" the accommodation proviso to create the very type of preferential treatment the statute was designed to eradicate. The *Amicus* EEAC further urges that the Court excuse an employer from having a duty to accommodate if it would result in violating a *bona fide* collective bargaining agreement, absent Union consent or waiver.

Finally, the matter should not end there for, the above considerations aside, the proviso, as interpreted,

conflicts with the First Amendment. The government seeks to compel action by private employers that will aid members of various sects to follow their respective religious practices to the detriment of coworkers who follow other religions or none at all. Simply put, this statutory enactment aids religion generally and violates the constitutionally required stance of government neutrality. It transgresses into an area that the Court has long viewed with great caution, yet its absence from the statute would in no way inhibit a single citizen from freely following his or her chosen religious beliefs under the Free Exercise Clause. Freedom of religion means the right to believe in any religion or no religion. This Court's striking down of the accommodation proviso leaves this fundamental tenet of our system fully intact. It is for these reasons that this Court should reverse the decision of the Circuit Court below.

ARGUMENT

I. THE RELIGIOUS ACCOMMODATION AMENDMENT FOSTERS PREFERENTIAL TREATMENT AND GENERATES A HOSTILE ENVIRONMENT CONTRAVENING THE BASIC PURPOSE OF TITLE VII

Title VII was the major Congressional commitment of this century to eradicate from the employment market, *inter alia*, those discriminatory employment practices in the area of religion that still lingered in our society after nearly 200 years of religious freedom. Section 703(a)(1), 42 U.S.C. 2000 e-2(a)(1), of the 1964 statute expressly prohibited discrimination on the grounds of religion.

As applied in this case, the 1972 amendment enlarging the definition of religion in Section 701(j), 42 USC 2000e(j), changed the original thrust of the legislation as expressed by this Court in *Griggs* v. *Duke Power Co.*: "Discriminatory preference for any group, minority or majority, is precisely and only what Congress proscribed." 401 US 424, 431, 3 FEP Cases 175, 177. Instead of merely seeking to prevent an employer from denying employment to someone on account of their religious beliefs, the Act, as construed below, places the employee in the position of being able to insist on creating special circumstances of employment, based upon the practices followed by his or her particular religion. Read thusly, the 1972 accommodation amendment to Section 701 altered not only the basic structure of Title VII, but gave it a cast that raises serious questions whether the Act has become a vehicle for fostering discriminatory practices as opposed to eliminating them. "Rather than 'putting teeth' into the Act, it [the amendment] mandates religious discrimination, thus departing from the Act's basic purpose." (Cellebresse, J. dissenting), *Cummins* v. *Parker Seal Co.*, (CA 6) 516 F.2d 544, 556, 10 FEP Cases 974, 986 (1975).

Efforts at accommodation result in discrimination in favor of the demanding religionist and against all others in the work force. Yet, the purpose of Title VII is to bring an end to discrimination by requiring uniform treatment without regard to religious beliefs of employees. Ironically, it would seem that accommodation of religion brings into play an inherent element that is at serious odds with the attainment of the very goals of the statute.

In the present case, Hardison is asking that he be singled out for special treatment from all others in the TWA work force *because* of his religion. The result of according him this special status can well lead to morale problems with the other employees who are forced to adjust their work patterns to meet his demands. Dissension and a sense of hostility toward both Hardison as the accommodated employee, and the employer, must be an anticipated by-product of the entire process, for in fact it is an imposition on them for Hardison to be accommodated.[2]

Further, the employer may be faced with conflicting demands by other religionists. For example, would it have been a violation of Title VII if TWA had rejected the demands of a second employee, an Orthodox Jew, working in Hardison's department, and demanding the same type of relief from Saturday work in order to follow his religion's practices? The door of accommodation cannot be opened only for the first religionist. Where there is a conflict in accommodating the religious practices of two or more employees, and only one can be satisfied because of

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[2] Nothing herein should be construed as preventing an employee from seeking his employer's approval of substitute or exchange arrangements made with his fellow employees. But *Cf. Reid* v. *Memphis Publishing Co.*, (C.A. 6) 521 F.2d 512, ——, 11 FEP Cases 129, 132 (1975) cert. den'd, —— U.S. ——, 13 FEP Cases 1408 (1976), where the Circuit Court noted that in order for Reid to be accommodated, "another copyreader who had seniority over Reid would have to be involuntarily assigned to take his place on every other Saturday, even though the other man did not desire to work on that day".

business considerations, which one should be given preference?

The Court of Appeals below essentially considered the impact of accommodation on TWA's business operations in the context of only a single employee, Hardison, and without real regard to other employees at the Company's operations. But to let it rest there is to view the matter in a vacuum. Application of the statute is not restricted solely to the major religious groups but embraces all religious orders, each with its own particular beliefs and practices. It also includes the non-religious. *Young* v. *Southwestern Savings and Loan Assn.*, (CA 5) 509 F.2d 140, 10 FEP Cases 522 (1975). To avoid violating it, under the Respondent's view, an employer is thus required to accommodate the demands of every religionist in its work force. This is an intolerable burden. *Stimpel* v. *State Personnel Board of the State of California*, 85 Cal.Rep. 797, 6 Cal.App.3d 206 (1970); cert. den'd. 400 US 952 (1970).

The difficulty with the duty created under the proviso, as interpreted by the Court of Appeals below, is that it places an almost impossible burden on the average employer who is not otherwise discriminating against the religious beliefs or practices of its employees in violation of the basic purpose of the Act, but merely trying to run his establishment.[3] Although the Court of Appeals suggested

[3] This is particularly true in the case of some businesses, such as public utilities, or quasi-public utilities as TWA, that are required by their very nature or government fiat to operate 24 hours a day, seven days a week, so as to provide either uninterrupted service or service on a comparable continuous basis.

that TWA might simply have operated shorthanded when Hardison's religious practices made him unavailable to work his scheduled shifts, the *Amicus* EEAC submits that this would *presumptively* create an undue hardship on the employer. That TWA assigned Hardison to work the shifts in question and was prepared to pay him to do so is sufficient to establish that his services were needed.

The decision below, however, places the employer in a position of constantly having to arrange and rearrange its business operations in a never-ending series of adjustments that can only be highly disruptive and counter-productive to its efforts at running on a business-like and efficient basis.[4]

The irony of the decision below is that far from pushing the religion of an employee into the background in connection with employment, it actually brings it to the forefront and focuses attention on it. This result cannot be reconciled with the dominant purpose of Title VII.

II. THE STATUTE EXCUSES EMPLOYERS FROM THE DUTY OF ACCOMMODATION IF IT REQUIRES VIOLATING A COLLECTIVE BARGAINING AGREEMENT

In the present case, both Petitioners, TWA and the International Association of Machinists, have expressed great concern over whether the duty requires an employer to violate the provisions of a negotiated collective bargaining agreement as a "rea-

[4] Many businesses in this Country are labor intensive in cost and these employers' profit margins are dependent upon maximum utilization of their work forces to achieve high productivity and minimize inflationary excessive costs.

sonable" effort at accommodation. EEAC shares this concern on behalf of those of its members who have entered into such agreements under the National Labor Relations Act or the Railway Labor Act.

Nowhere in Title VII is it suggested that employers and unions are required to rewrite labor contracts to meet limitations and working conditions laid down by individual employees working for them. That result, however, is the strong implication of the Court of Appeals' decision below. But no evidence has surfaced to show that Congress intended to modify, on a general basis, the underlying purposes of the nation's two collective bargaining statutes. When an employer settles on the "bargain" with the employees' union representative, it is with the knowledge that, for the term of the agreement, certain ground rules have been fixed. As such, it enables the employer to plan work schedules, make manpower assignments, and generally endeavor to manage the business in workmanlike fashion. It depends upon the stabilizing force of the collective bargaining agreement to help it plan and function efficiently.

On the union side, the employees in the bargaining unit vote to accept an agreement with advance knowledge as to the "wages, hours, and other conditions of employment" offered by the employer for the term of the contract. Acceptance seals the bargain on their end. Individual bargaining is prohibited. *NLRB* v. *J. I. Case*, 321 US 332, 14 LRRM 501 (1944). The Court of Appeals evidenced little concern over this aspect of the case and the national labor policy on enforcement of collective bargaining agreements.

Discussing the alternatives that it felt were open to TWA in meeting the statutory duty of accommodation, the Court conceded that under the labor agreement, "Every swap was technically at risk because the exchange was subject to the right of a senior worker to bump into the opening", 527 F.2d 33, 41, 11 FEP Cases 1121, 1126 (1975).[5]

EEAC submits that this Court here should clearly rule that employers are excused from the duty of religious accommodation under Section 701(j) when the religionist's requested accommodation conflicts with the provisions of a *bona fide* collective bargaining agreement, negotiated in good faith and otherwise neutral in content on its face. This is the plain meaning of Section 703(h) that expressly permits the application of "different terms, conditions or privileges of employment pursuant to a *bona fide* seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin". Such language is evidence Congress did not intend to cause wholesale disruption of the collective bargaining process. Where there is no intent to discriminate because of religion on the part of the parties to a labor contract, the Court should hold that accommodation creates an undue hardship if it requires an employer to take any ac-

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[5] However, it was quite willing to leave the employer in such vulnerable posture, noting only that the issue of the "proper relationship between a *bona fide* seniority system and the requirement of reasonable accommodation has not yet been settled by the Supreme Court."

tion that will be contrary to the terms of such contract, absent Union consent or waiver.[6]

The contrary holding below interfers with the contractual rights of the other employees and places a heavy burden on the employer that can properly be considered as an undue hardship sufficient to excuse it. Reversal of that holding would not do violence to the primary protection accorded religion under Title VII. It would, however, reassure parties seated around the negotiating table that they are not writing a contract with disappearing ink.

III. THE FIRST AMENDMENT IS A CONSTITUTIONAL BAR TO ANY GOVERNMENT-IMPOSED OBLIGATION ON EMPLOYERS IN TITLE VII TO ACCOMMODATE THE RELIGIOUS PRACTICES OF SOME EMPLOYEES TO THE DETRIMENT OF OTHERS IN THE WORK FORCE

Like *Dewey* v. *Reynolds Metals Co.*, 402 US 689, 3 FEP Cases 308 (1971) and *Parker Seal Company* v. *Cummins*, —— US ——, 13 FEP Cases 1178 (1976), this case raises a constitutional issue that goes to the very core of the Establishment Clause of the First Amendment. It requires the essential inquiry whether the religious accommodation proviso violates the constitutionally-required neutral stance of the government.[7]

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[6] Nothing in the record of this case below appears to challenge the non-discriminatory nature of the collective bargaining provisions before the Court here.

[7] The Court is urged to adopt the cogent dissent of Judge Celebrezze in *Parker Seal Co.* v. *Cummins, supra,* at 516 F.2d 554, 10 FEP Cases 983 on the unconstitutionality of the accommodation amendment.

A. The First Amendment Requires Government Neutrality In The Area Of Religion.

The reported decisions of this Court are not barren as to the intended scope of the First Amendment to the Constitution. Explicit and well known, its basic philosophy as regards religion is simple. The government must not establish, favor, or support any religion. This Court expressly reaffirmed such philosophy in *McGowan* v. *Maryland,* 366 US 420, 443, 6 L.Ed.2d. 393, 406 (1961), emphasizing that under the First Amendment the Federal Government cannot "pass laws which aid one religion, aid all religions, or prefer one religion over another".

Neither support nor hostility, but neutrality, is the goal of the religion clause. *Gillette* v. *United States, et al,* 401 US 437 (1971). As Justice Marshall, speaking for the Court in *Gillette* observed:

> ". . . but the Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere they must be secular in purpose, evenhanded in operation and neutral in impact." *Supra,* 401 US 450.

The Court's inquiry therefore must begin from this critical focal point. Applied to the statute here, it raises the question whether Congress has violated the government's obligation of neutrality by mandating that employers *must* exert efforts to restructure working conditions at their business to accommodate any conflicts with the religious "practices" of employees working there.[8]

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[8] The choice of the word "practices" in 701(j) is particularly revealing for it indicates a Congressional awareness that

The language of the proviso and the attendant guideline, on their face, do not purport to be neutral, even in tone, for they require the taking of action by one of the parties touched. Thus, the initial reaction has to be that the scales are being decidedly tipped away from a neutral stance of government which is required by the First Amendment.

B. No Conflict With The Free Exercise Clause Is Involved Here.

The Court has acknowledged in recent years that "tension inevitably exists between the Free Exercise and the Establishment Clauses". *Committee for Public Education* v. *Nyquist*, 413 US 756 (1972). The Court in *Nyquist* went on to note that "it may often not be possible to promote the former without offending the latter". *Supra* at 413 US 788. But Hardison's case here does not reach the purview of the Free Exercise Clause for nothing has been done, either by TWA or the Union, to impede or otherwise infringe upon his *right to believe* in his church or follow any of its tenets.[9] Absent the accommodation proviso, Hardison is totally free to remain a conscientious follower of the World Wide Church of God.

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it was going beyond the protection of the exercise of freedom of mere religious beliefs.

[9] This distinction renders *Sherbert* v. *Verner*, 374 U.S. 398 (1963) inapposite here. Additionally, as Justice Brennan observed in *Sherbert*, recognition of the claimant's right to unemployment benefits did not "serve to abridge any other person's religious liberties". *Supra* at 374 U.S. 409.

Nor is he being compelled to choose between working and his religion. He is not being required to abandon his religious beliefs and nothing prevents him from seeking a position that does not conflict with *his* restrictions on availability for work. But when the Congress, by legislative enactment, advises TWA it must rearrange its business affairs, as well as impose upon its other employees, all to accommodate a situation generated by Hardison's desire to exercise his right to adhere to his freely chosen religious practices, the government transgresses into the forbidden zone delineated by the Establishment Clause and seeks to favor him in support of his religion.

C. Hardison Seeks A Discriminatory Preference In Furtherance Of His Religious Beliefs.

Respondent Hardison converted to his religion after he had been working at the employer's business for several years. He thus seeks the support of the government, under Title VII, to compel his employer, TWA, to rearrange its operations and the scheduling of its other employees so that he can engage in various practices dictated by the religious group to which he now subscribes. It is important to note again that nothing has been done to him which otherwise prevents his freely following that religious order. He has not been compelled to give up his religion, nor to abandon his beliefs. What he asks this Court to now hold is that his employer must make a job available to him on *his* terms, i.e., consistent with the "practices" observed by his religious affiliation. The *Amicus* EEAC submits that this constitutes, in effect, a demand for preference in sup-

port of religion and contrary to the Establishment Clause of the First Amendment.

If granted, the effect of such demands is to advance his religious sect at the expense of other employees in the plant, including those who profess to follow no religion at all. The essence of an obligation to accommodate in this case necessarily carries with it preferential treatment for the employee seeking it. But as noted earlier by this Court, the Conress cannot pass laws which prefer one religion over another. *McGowan* v. *Maryland*, *supra*.

The basic effect of the religious accommodation requirement is unconstitutionally to advance the position of one religionist to follow his or her religious beliefs vis-a-vis that of every other employee in the particular employer's operations. Hardison here actually seeks special treatment *because* of his religion, a result that appears to be the very antithesis of the neutral approach required of the government. "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion." *Wisconsin* v. *Yoder*, 406 US 205, 220 (1972).

Within the framework of reference alluded to by Justice Harlan in his concurring opinion in *Walz* v. *Tax Commission*, 397 US 664 (1970), the degree of involvement sought by Hardison here would be a "continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement". *Supra* at p. 705. For as Justice Harlan had concluded:

> "In determining whether a particular government action breaches the establishment clause prohibition we must look not only at the executive purpose but also at the end result. We must be sure that the end result—the effect—is not an excessive government entanglement with religion. The test is inescapably one of degree." *Supra* at p. 704.

The religious accommodation urged by Respondent cannot be made by this Court without unconstitutionally granting preferential treatment to employees holding religious beliefs as opposed to those possessing atheistic or non-orthodox beliefs. It requires employers to award a generally-coveted employment benefit —weekend time off—to those who desire it for religious reasons, to the detirment of others who prefer not to work weekends for secular reasons.

The religious accommodation requirement in Title VII gives aid and support in the establishment of an employee's self-imposed requirement to adhere to his religious practices. It clearly fails to "pass muster" under the tripartite test enunciated by this Court in *Committee for Public Education* v. *Nyquist*, *supra*. From the legislative history, the statute is non-secular in purpose. Further, its primary effect is to advance religion and, as noted earlier, it enmeshes the government in a briar patch of regulation and surveillance. As such, failing to meet the *Nyquist* standards, it must fall. Prohibited by the First Amendment, it may not be lawfully advanced by the Congress even under the otherwise welcome standard of equal employment opportunity.

As this Court has observed in *Cantwell* v. *Connecticut*, 310 US 296 (1940), the First Amendment embodies two concepts: freedom to believe and freedom to act. "The first is absolute, but in the nature of things, the second cannot be." *Supra*, at 310 US 303-4. In asking the support of the government under Title VII, to compel other persons to accommodate their ways to the pattern of his religious beliefs, Hardison necessarily calls for the involvement of government to a degree that squarely contravenes the ban of the Establishment Clause. The Court, however reluctantly, must decide against him.

IV. CONCLUSION

For the reasons stated above, the *Amicus Curiae* urges that the decision of the Court below should be reversed and judgment entered in favor of the Appellants.

Respectfully submitted,

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MOTION FILED
JAN 15 1977

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1126

TRANS WORLD AIRLINES, INC.,
Petitioner,

vs.

LARRY G. HARDISON, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 142, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 1650,
Respondents.

and

No. 75-1385

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 142, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 1650,
Petitioners,

vs.

LARRY G. HARDISON and TRANS WORLD AIRLINES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Motion of Chrysler Corporation for Leave to File Brief Amicus Curiae in Support of Petitioners

and

Brief of Chrysler Corporation as Amicus Curiae

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1126

TRANS WORLD AIRLINES, INC.,
Petitioner,

vs.

LARRY G. HARDISON, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 142, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 1650,
Respondents.

and

No. 75-1385

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 142, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 1650,
Petitioners,

vs.

LARRY G. HARDISON and TRANS WORLD AIRLINES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION OF CHRYSLER CORPORATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Chrysler Corporation ("Chrysler"), pursuant to Supreme Court Rule 42(3), hereby moves for leave to file the attached brief *amicus curiae* in support of the petitioners in these consolidated cases.[1] The consent of counsel for the International Association of Machinists and Aerospace Workers, International

[1] By order of this Court, entered on November 15, 1976, the petitions for writs of certiorari were granted and these cases were consolidated. 45 U.S.L.W. 3359.

Association of Machinists and Aerospace Workers, District 142, and International Association of Machinists and Aerospace Workers, Local 1650, [collectively referred to herein as "Machinists"] was requested and received. The consents of counsel for Larry G. Hardison and Trans World Airlines were sought and denied.[2]

Chrysler is a major manufacturer and distributor of motor vehicles and parts, transacting business both in interstate and foreign commerce. Its United States work force, involved principally in the manufacture and distribution of motor vehicles and parts, numbers in excess of 130,000, and of these, approximately 108,500 employees, or 83%, are encompassed by Chrysler's collective bargaining agreements with the United Automobile, Aerospace, and Agricultural Implement Workers of America. Pursuant to the provisions of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, these collective bargaining agreements govern Chrysler's relationship to its employees regarding wages, hours and other terms and conditions of employment.

This case requires this Court to determine the constitutionality of the statutory duty, imposed by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(j) ["Title VII"], of an employer to reasonably accommodate the religious needs of an employee. Chrysler's interest in this action evolves from its need, as a major American employer, to know the specific legal standard applicable to employers when they are confronted with a request for the modification of uniform contractual work standards and hours due to the individual's religious observances.

---

[2] Chrysler has participated in this case previously by obtaining the consents of the parties and filing a brief *amicus curiae* in support of the petition for a writ of certiorari of Trans World Airlines (No. 75-1126). The written consent of the Machinists, to the filing of this brief, has been filed with the Clerk.

The immediate interest of Chrysler in this case arises from its status as a party to *Blakely v. Chrysler Corporation et al.*, 407 F.Supp. 1227 (E.D. Mo. 1975), presently pending in the Court of Appeals for the Eighth Circuit (No. 76-1196). The *Blakely* case also involves allegations of religious discrimination, and the action of this Court in the instant case will be outcome-determinative as to first amendment issues raised in *Blakely*.

In this case, the petitioners have not addressed themselves to pertinent constitutional questions arising under the due process clause in either their briefs filed in the Eighth Circuit or their respective petitions for certiorari. Neither have they considered the issue as to what duty, if any, is by necessary implication, imposed upon an employee who seeks accommodation of his religious needs.

It is believed that the views presented herein are relevant to this case and will aid in the disposition of the difficult issues before this Court.

Respectfully submitted,

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF CHRYSLER CORPORATION IN SUPPORT OF PETITIONERS

SUMMARY OF ARGUMENT

The duty of reasonable accommodation, imposed by § 701(j) of Title VII and as interpreted by the courts, requires a private employer to modify uniform work obligations, in order to satisfy the religious needs of any employee. The imposition of this

duty by the federal government contravenes the letter and spirit of the establishment clause of the first amendment.

Even if this duty can withstand scrutiny under the first amendment, it is constitutionally infirm under the due process clause of the fifth amendment. This infirmity arises because the duty of reasonable accommodation, which is an affirmative duty imposed upon an employer, is not codified with the requisite degree of specificity. Consequently, an employer is unable to discern, with reasonable certainty, the parameters of the duty imposed and the conduct proscribed which may give rise to liability.

The duty of reasonable accommodation is not a unilateral duty imposed solely upon an employer. Rather, it is a bilateral duty which includes the initial obligation of an employee, who seeks accommodation, to accommodate his own religious beliefs. The employee's fulfillment of this initial duty of "self-accommodation" is a condition precedent to the imposition of liability upon his employer.

ARGUMENT

I

The Duty of Reasonable Accommodation Is Unconstitutional Under the Establishment Clause of the First Amendment.

At issue is the constitutionality of § 701(j) of Title VII which requires an employer to reasonably accommodate an employee's religious beliefs through the modification of uniform work obligations established pursuant to a collective bargaining agreement. It is submitted that the imposition of this duty cannot withstand constitutional scrutiny for it is violative of the first amendment and the cardinal principle of governmental neutrality toward religion.

A. The statutory and guideline scheme.

Since 1964 § 703(a)(1) of Title VII has provided in relevant part:

> "It shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . ." 42 U.S.C. § 2000e-2(a)(1) (1974).

In 1966 the Equal Employment Opportunity Commission ("EEOC") promulgated its initial guideline [29 C.F.R. § 1605.1, 31 Fed. Reg. 8370] to implement this statutory prohibition against religious discrimination.[3] This guideline established a

[3] In its entirety, the 1966 religious discrimination guideline, 29 C.F.R. § 1605.1 (31 Fed. Reg. 8370) stated:

> "Section 1605.1 Observance of Sabbath and religious holidays.—(a)(1) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or to refuse to hire a person whose religious observances require that he take time off during the employer's regular work week. These complaints arise in a variety of contexts, but typically involve employees who regularly observe Saturdays as the Sabbath or who observe certain special holidays during the year.
>
> (2) The Commission believes that the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate the reasonable religious needs of employees and, in some cases, prospective employees where such accommodation can be made without serious inconvenience to the conduct of the business.
>
> (3) However, the Commission believes that an employer is free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday.
>
> Likewise, an employer who closes his business on Christmas or Good Friday is not thereby obligated to give time off with pay to Jewish employees for Rosh Hashanah or Yom Kippur:
>
> (b) While the question of what accommodation by the employer may reasonably be required must be decided on the peculiar facts of each case, the following guidelines may prove helpful.
>
> (1) An employer may permit absences from work on religious holidays, with or without pay, but must treat all religions with substantial uniformity in this respect. However, the closing of a business on one religious holiday creates no obligation to permit time off from work on another.
>
> (2) An employer, to the extent he can do so without serious inconvenience to the conduct of his business, should make a reasonable accommodation to the needs of his employees and applicants for employment in connection with special religious holiday observances.
>
> (3) The employer may prescribe the normal work week and foreseeable overtime requirements, and absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs.

general obligation to accommodate an employee's religious needs when this could be accomplished without serious business in-

convenience. Absent an intent to discriminate on a basis of religion, an employer was specifically permitted to prescribe a normal work week, including overtime, and an applicant or employee, knowing that these requirements might pose a conflict, was not entitled to demand an alteration.

Subsequently, in 1967, this guideline was replaced by the present administrative guideline which imposed an unprecedented obligation upon an employer to defer to his employee's professed religious beliefs.[4] Some courts questioned whether the

(4) Where an employee has previously been employed on a schedule which does not conflict with his religious obligations, and it becomes necessary to alter his work schedule, the employer should attempt to achieve an accommodation so as to avoid a conflict. However, an employer is not compelled to make such an accommodation at the expense of serious inconvenience to the conduct of his business or disproportionate allocation of unfavorable work assignments to other employees."

[4] The present guideline, 29 C.F.R. § 1605.1 (32 Fed. Reg. 10298), states:

"Section 1605.1 Observance of Sabbath and other religious holidays.—(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

EEOC's 1967 guideline was authorized by the original statutory prohibition against religious discrimination. *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 331 n.1, 334 [12-16]

(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people."

It is submitted that in accord with this Court's recent opinion of *Gilbert v. General Elec. Co.*, 45 U.S.L.W. 4031, (U.S. Dec. 7, 1976) (Nos. 74-1589, 74-1590) the 1967 EEOC guideline should be accorded little, if any, weight. In *Gilbert* the Court stated:

> In evaluating this contention [that the EEOC guidelines are entitled to great deference] it should first be noted that Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975). This does not mean that EEOC guidelines are not entitled to consideration in determining legislative intent, see *Albemarle, supra; Griggs v. Duke Power Co.*, 401 U.S., at 433-434; *Espinosa v. Farah Mfg. Co.*, 414 U.S. 86, 94 (1973). But it does mean that courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law, see *Standard Oil Co. v. Johnson*, 316 U.S. 481, 484 (1942), or to regulations which under the enabling statute may themselves supply the basis for imposition of liability, see, *e.g.*, § 23(a), Securities Act of 1934, 15 U.S.C. § 78w(a). The most comprehensive statement of the role of interpretative rulings such as the EEOC guidelines is found in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), where the Court said:
>
> > "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control"

The EEOC guideline in question does not fare well under these standards. It is not a contemporaneous interpretation of Title VII, since it was first promulgated eight years after the enactment of that Title. More importantly, the 1972 guideline flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute." [Footnote omitted] *Id.* at 4035-36.

(6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971); *Kettell v. Johnson & Johnson*, 337 F. Supp. 892 (E.D. Ark. 1972). The *Dewey* case prompted Congress in 1972 to amend Title VII[5] by codifying the following definition of the term "religion" as §701(j) of the Act:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

This statutory definition parallels the reasonable accommodation theory of the 1967 EEOC guideline. *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 517 n.1 (6th Cir. 1975); *Cummins v. Parker Seal Co.*, 516 F.2d 544, 547 (6th Cir. 1975), *aff'd by an equally divided Court*, 45 U.S.L.W. 4009 (U.S. Nov. 2, 1976) (No. 75-478).

This analysis is applicable with equal force to the religious discrimination guidelines for, as noted by the Court, the EEOC is, by virtue of § 713(a) of Title VII [42 U.S.C. § 2000e-12(a)], without statutory authority to promulgate substantive rules or regulations. *E.g., Gilbert, supra; EEOC v. Raymond Metal Prods. Co.*, 530 F.2d 590, 593 (4th Cir. 1976); *Reynolds Metals Co. v. Rumsfeld*, 417 F. Supp. 365, 372 (E.D. Va. 1976); *Dobbins v. IBEW Local 212*, 292 F. Supp. 387, 414-15 (S.D. Ohio 1968). Insofar as it cannot be seriously questioned that the religious discrimination guideline is substantive, it exceeds the EEOC's statutory power, is null and void and should be disregarded. *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129, 134-35 (1936); *Reid v. Memphis Publishing Co.*, 521 F.2d 512, 519-20 (6th Cir. 1975) *cert. denied*, 45 U.S.L.W. 3361 (U.S. Nov. 15, 1976) (No. 75-1105).

[5] This amendment was accomplished by passage of The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, effective March 24, 1972. The legislative history is quite explicit indicating that Congress was responding directly to the *Dewey* decision. The Conference Committee Report to the Equal Employment Opportunity Act of 1972, 118 Cong. Rec. 7167 (1972) states:

> "The purpose of this subsection is to provide the statutory basis for EEOC to formulate guidelines because of religion such as those challenged in *Dewey v. Reynolds Metals Company*, 429 F.2d 325 (6th Cir. 1970), Affirmed by an equally divided court, 402 U.S. 689 (1971)."

At least one court of appeals has held that the EEOC's 1967 guideline even exceeds the scope and intent of this 1972 amendment to Title VII and that the statute requires employers to refrain only from religious discrimination. *Reid v. Memphis Publishing Co.*, 521 F.2d 512, 519-21 (6th Cir. 1975), *cert. denied*, 45 U.S.L.W. 3361 (U.S. Nov. 15, 1976) (No. 75-1105).

B. The duty of reasonable accommodation does not fulfill the Supreme Court's tripartite tests.

The establishment clause of the first amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting the establishment of religion. . . ."

This Court, when called upon to interpret this provision, has frequently reiterated the following maxim:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. • • • In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'."

Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947).

In order to determine whether challenged legislation impermissibly causes a breach in the "wall of separation", this Court has required the fulfillment of the following tripartite tests, to be applied disjunctively.

> "[T]he law in question, first, must reflect a clearly secular legislative purpose, • • • second, must have a primary effect that neither advances nor inhibits religion, • • • and, third, must avoid excessive government entanglement with religion." [citations omitted]

Committee for Public Educ. v. Nyquist, 413 U.S. 756, 773 (1973). Thus, in the context of the immediate inquiry, § 701(j) of the Act and the EEOC guideline must satisfy each of the above tests. Chrysler respectfully submits that neither § 701(j) nor the EEOC guideline can fulfill any of the three tests stated in *Nyquist* and that they are therefore unconstitutional.

1. Section 701(j) lacks a clearly secular legislative purpose.

The legislative history, pertaining to the 1972 amendments to Title VII, distinctly indicates the ecclesiastical purpose behind that provision. Its examination is relevant in view of this Court's determination to accept at face value, the statement of Congress as to its purpose in adopting legislation which is subsequently challenged on establishment clause grounds. *E.g., Meek v. Pittenger*, 421 U.S. 349, 363 (1975); *Sloan v. Lemon*, 413 U.S. 825, 829-30 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

The following remarks of Senator Randolph, who offered the disputed provision as a floor amendment, reveal clearly that the advancement of Saturday Sabbatarian religions was the purpose behind this legislation:

> "I am sure that my colleagues are well aware that there are several religious bodies—we could call them religious sects; denominational in nature—not large in memberships, but with certain strong convictions, that believe there should be a steadfast observance of the Sabbath and re-

> quire that the observance of the day of worship, the day of the Sabbath, be other than on Sunday. On this day of worship work is prohibited whether the day would fall on Friday, or Saturday or Sunday. There are approximately 750,000 men and women who are Orthodox Jews in the U.S. work force who fall in this category of persons I am discussing. There are an additional 425,000 men and women in the work force who are Seventh Day Adventists.
>
> • • •
>
> I say to the distinguished chairman of the Labor and Public Welfare Committee who manages this bill, that there has been a partial refusal at times on the part of employers to hire or continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days. So there has been, because of understandable pressures, such as commitments of a family nature and otherwise, a dwindling of the membership of some of the religious organizations because of the situation to which I have just directed attention.
> My own pastor in this area, Rev. Delmar Van Horne, has expressed his concern and distress that there are certain faiths that are having a very difficult time, especially with the younger people and understandably so, with reference to a possible inability of employers on some occasions to adjust to work schedules to fit the requirements of the faith of some of their workers." 118 Cong. Rec. 705 (1972).

Thus, with unmistakable clarity, the legislative history indicates an "abandon[ment of] secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization." *Gillette v. United States*, 401 U.S. 437, 450 (1971). Hence, the first of the tripartite tests cannot be fulfilled.

2. Section 701(j) has a primary effect which advances religion.

In cases in which the purpose of the law was at issue, this Court has examined not only its avowed purpose, but also its effect. Thus, it is required that the challenged legislation must have a primary effect which neither advances nor inhibits religion and which is evenhanded in operation. *Gillette v. United States*, 401 U.S. 437, 450 (1971). Consequently, a law which advances all religions violates the establishment clause. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Illinois ex rel. McCullom v. Board of Educ.*, 333 U.S. 203 (1948).

Cases which have upheld laws providing benefits to believers have done so on the ground that the law affects believers and non-believers equally. In *Everson v. Board of Educ.*, 330 U.S. 1 (1947), a state plan to subsidize bus transportation for all students was upheld on the basis that the legislation only helped parents to get their children to and from school. In reaffirming the neutrality principle the Court stated: "[The First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers . . ." 330 U.S. at 18. Similarly, in *Board of Educ. v. Allen*, 392 U.S. 236 (1968), the Court upheld a state law that provided secular textbooks for all students in grades seven through twelve. The Court found that "[t]he law merely makes available to all children the benefits of a general program to lend school books free of charge." 392 U.S. at 243. In both of the above cases, the law operated equally as to all students and provided nothing to believers that it did not provide to non-believers. Consequently, it was evident that the laws were fundamentally neutral and only served the secular purpose of advancing education.

Section 701(j) of Title VII and the EEOC guideline, however, do not operate in a neutral manner. Rather than requiring

an employer to treat all employees equally, the statute and guideline require that an employer give preferential treatment to an employee in order to accommodate that employee's religious needs.[6] In essence, the statute requires that non-believing employees bear the consequential burden imposed by the religious preferences of other employees. Therefore, although the guideline ostensibly provides for employment security, by not allowing an employer to discharge an employee for the employee's inability, because of religious beliefs, to conform to the applicable work rules,[7] in application the guideline promotes the religion of the particular employee by imposing upon the employer and other employees the inconvenience and burden of the employee's inability to conform. *Cummins v. Parker Seal Co.*, 516 F.2d 544, 554 (6th Cir. 1975) (dissenting opinion).

The constitutionality of the duty of reasonable accommodation, in terms of its effect, was questioned in *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970) *aff'd by an equally divided Court*, 402 U.S. 689 (1971):

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[6] The duty of reasonable accommodation imposed upon Chrysler and other employers far exceeds the scope of any other duty created by Title VII. Indeed, a discriminatory religious preference results from this duty. This is contrary to the pronouncement of the Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971):

> "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.* at 431.

[7] This duty is mandated despite the existence of a bona fide seniority or other collective bargaining provision which may be within the ambit of § 703(h) of the Act [42 U.S.C. § 2000e-2(h)] which states in relevant part:

"Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of . . . religion. . . ."

"To construe the Act as authorizing the adoption of Regulations which would coerce or compel an employer to accede to or accommodate the religious beliefs of all of his employees would raise grave constitutional questions of violation of the Establishment Clause of the First Amendment. It is settled that the Government, in its relations with religious believers and non-believers, must be neutral. The Government is without power to support, assist, favor or handicap any religion.

* * *

No one disputes Dewey's right to his religious beliefs. The question is whether he has the right to impose his religious beliefs on his employer and interfere with the operation of its plant." *Id.* at 334-35.

Other courts have also questioned the constitutionality of §701(j). *Reid v. Memphis Publishing Co.*, 521 F.2d 512 (6th Cir. 1975), *cert. denied*, 45 U.S.L.W. 3361 (U.S. Nov. 15, 1976) (No. 75-1105); *Yott v. North Am. Rockwell*, Civil No. 71-1918-R (C.D.Cal., filed Jan. 10, 1977); *Fischer v. Alsing*, 7 FEP Cases 220 (D.Ore. 1974); *Kettell v. Johnson & Johnson*, 337 F. Supp. 892 (E.D. Ark. 1972); *Dawson v. Mizell*, 325 F. Supp. 511 (E.D. Va. 1971).

The first of two prohibited effects, resulting from the imposition of the duty of reasonable accommodation, is that it discriminates against the irreligious: It prefers, and confers employment advantages upon those who are religious over those who are not. It cannot be questioned that by mandating that the religious needs of an employee be accommodated by his employer, that particular employee is substantially benefited. No similar benefit is conferred upon those who are without a religious affiliation. This preferential advantage was recognized in *Cummins v. Parker Seal Co.*, 516 F.2d at 558 (dissenting opinion):

> "Only those with 'religious practices' may benefit from the rule. Others are forced to submit to uniform work rules

> and to bear the burdens imposed by their employers' accommodation to religious practitioners. Thus, the rule discriminates against those with no religion, although the freedom not to believe is within the First Amendment's protection."

Thus, the first amendment's prohibition, which has been interpreted to forbid the aiding of all religions as against non-believers, is violated. *Walz v. Tax Commission*, 397 U.S. 664 (1970); *Torcaso v. Watkins*, 367 U.S. 488 (1961).

Secondly, Saturday Sabbatarian faiths are particularly benefited from the accommodation mandate. As noted by Senator Randolph, by virtue of governmental assistance, such faiths may experience "a somewhat larger attendance with the correspondingly fuller collection plate." *Cummins v. Parker Seal Co.*, 516 F.2d at 553. This duty imposes upon employers and other employees the views of the employee who is a Saturday Sabbatarian or whose beliefs fall outside the mainstream of American religions. Thus, it is clear that the accommodation requirement discriminates between religions and violates the requirement of government neutrality between religions. *Zorach v. Clauson*, 343 U.S. 306, 315 (1952), *see also Everson v. Board of Educ.*, 330 U.S. 1 (1947). Therefore, the reasonable accommodation laws are more advantageous to the World Wide Church of God than to non-Sabbatarian faiths. This further preferential effect was noted in *Cummins, supra,* (dissenting opinion):

> "Only those [religions] which require their followers to manifest their belief in acts requiring modification of an employer's work rules benefit, while other employees are inconvenienced by the employer's accommodation. By singling out particular sects for government protection, the Federal Government has forfeited the pretense that the rule is merely part of the general ban on religious discrimination." *Id.* at 558.

Insofar as the duty of reasonable accommodation has a primary effect that advances religion generally, and some religions specifically, it runs afoul of the second of the tripartite tests and is constitutionally infirm. *Walz v. Tax Commission*, 397 U.S. 664, 695 (1970); *Abington School Dist. v. Schempp*, 374 U.S. 203, 305 (1963).

3. Section 701(j) requires excessive government entanglement with religion.

Third and lastly, the statute and EEOC guideline must avoid excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Walz, supra*. The entanglement of the government with this issue is twofold: first, the statutory notion of a "religious belief" is vague and elusive for it is stated in § 701(j) that: "religion includes all aspects of religious observance and practice, as well as belief . . .". Therefore, the pronouncement of this Court in *Gillette v. United States*, 401 U.S. 437 (1971) is relevant to this stautory definition:

> "[I]t is true that 'the more discriminating and complicated the basis of classification for an exemption—even a neutral one—the greater the potential for state involvement' in determining the character of persons' beliefs and affiliations, thus entangl[ing] government in difficult classifications of what is or is not religious' . . ." *Id.* at 457.

The definition of "religion", codified at § 701(j) is also inadequate for, upon its face, it is circular. It states that religion is religion unless an employer proves undue hardship. Thus, if undue hardship exists, religion does not.[8]

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[8] *See* section III *infra* at p. 24.

The unlimited scope of this provision necessarily requires extensive government entanglement through review by both the EEOC[9] and the courts of the nature of the employee's beliefs, the sincerity and depth of his belief, and whether the employee's asserted need for accommodation is bona fide. *See, e.g., Kettell v. Johnson & Johnson*, 337 F. Supp. 892 (E.D. Ark. 1972); Comment, 44 Fordham L. Rev. 442, 449 n. 6 (1975). There are innumerable instances in which an employee may, in the context of § 701(j), seek an accommodation of any "aspect of religious observance and practice, as well as belief."[10]

This danger of entanglement was recognized in *Cummins v. Parker Seal Co.*, 516 F.2d 544, 559 (6th Cir. 1975) (dissenting opinion), *aff'd by an equally divided Court*, 45 U.S.L.W. 4009 (U.S. Nov. 2, 1976) (No. 75-478):

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[9] The filing of a charge with the EEOC is a jurisdictional prerequisite to the maintenance of suit under § 706 of Title VII, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973). Therefore, the EEOC, in the first instance, is "entangled" in determining whether the employee's professed beliefs constitute a "religion".

As to Saturday Sabbatarians, the EEOC has even determined that an employee, who was not affiliated with any identifiable religious order, but who felt that Saturday was to be observed as a day of rest, was within the ambit of § 701(j). EEOC Decision No. 76-104, 12 FEP Cases 1359 (April 2, 1976).

[10] *E.g., Young v. Southwest S & L Ass'n*, 509 F.2d 140 (5th Cir. 1975) [atheist objected to prayer conducted at employee meetings]; *Yott v. North Am. Rockwell*, 501 F.2d 398 (9th Cir. 1974) [religious objection of employee to payment of union dues]; *Geller v. Secretary of Defense*, 13 FEP Cases 1118 (D. D.C. 1976) [Rabbi wearing a beard]; *Weitkenhaut v. Goodyear Tire & Rubber Co.*, 381 F. Supp. 1284 (D. Vt. 1974 [church minister's need to attend meetings]; *Abdush-Shadid v. Narcotics Comm'n*, 12 FEP Cases 136 (Sup. Ct. N.Y. 1975) [Muslim's dress requirements]. *See generally*, P. Kamper, *Religion and the Constitution* (1964); Edwards and Kaplan, Religious Discrimination and the Role of Arbitration under Title VII, 69 Mich. L. Rev. 599 (1971); Note, Religious Observance and Discrimination in Employment, 22 Syracuse L. Rev. 1019 (1971); Annot., 22 A.L.R. Fed. 580 (1975).

> "Disposition of [religious discrimination] complaints . . . will require inquiry into the sincerity with which beliefs are held and force consideration of the validity of the religious nature of claims, procedures which are not favored and may themselves be improper because they put courts in review of religious matters. [n. 11] *See United States v. Ballard*, 322 U.S. 78 (1944); *Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C. Cir. 1969); *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972)."

Thus, under the scheme of § 701(j) and EEOC Guideline 1605.1, the government is excessively entangled with religion. Therefore, the third of the tripartite tests enunciated in *Nyquist, supra*, is violated and the provisions at issue are unconstitutional under the establishment clause of the first amendment.

II

Section 701(j) Is Constitutionally Infirm Under the Due Process Clause of the Fifth Amendment.

The constitutional standard of due process of law, specified by the fifth amendment is applicable to corporations. *E.g., Sinking Fund Cases*, 99 U.S. 700, 719 (1879). In the context of reviewing §701(j) of Title VII, it must be determined whether the duty of reasonable accommodation is codified with sufficient definiteness or is impermissibly vague. It is submitted that this statute fails to comport with this constitutional standard.[11]

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[11] It is recognized that this issue was not presented to, or considered by the Eighth Circuit. However, because of the importance of this question, the resolution of which does not require an examination of any evidence, it may properly be considered by the Court. *Giordenello v. United States*, 357 U.S. 480, 484 n.2 (1958); *Jordan v. DeGeorge*, 341 U.S. 223 (1951); *Kiefer-Stewart v. Joseph E. Segram & Sons, Inc.*, 340 U.S. 211 (1950); *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1944); *cf., United*

The statutory duty of reasonable accommodation is not directly specified in §701(j) of the Act but rather, arises by implication from the Congress' definition of "religion" contained in that section:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

From the above language it is apparent that not only is the existence of the duty of reasonable accommodation obscure, but only through clairvoyance can the parameters of that duty be ascertained with reasonable certainty. As a result of the foregoing, unlawful religious discrimination in employment has been determined judicially, on an *ad hoc* basis, by converse definition: Religious discrimination against the employee exists if undue hardship does not exist for the employer.[12]

Brotherhood of Carpenters v. United States, 330 U.S. 395, 411-12 (1946). In *Kiefer-Stewart, supra*, the Court wrote:

> "Respondents also seek to support the judgment of reversal on other grounds not passed on by the Court of Appeals but which have been argued here both orally and in the briefs. These grounds raise only issues of law not calling for examination or approval of evidence and we will consider them." *Id.* at 214.

An additional issue appropriate for consideration is, assuming *arguendo*, the constitutionality of the duty of reasonable accommodation, when did that duty arise? Insofar as the effective date of the 1972 amendments to Title VII, was March 24, 1972, and as the EEOC lacked the statutory authority for its guideline prior to that date, *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970) *aff'd by an equally divided Court*, 402 U.S. 689 (1971), no liability should be imposed for pre-amendment acts. Otherwise, the imposition of liability would retroactively create an obligation which did not exist at the time of the acts complained of. *E.g., Weise v. Syracuse Univ.*, 522 F.2d 397 (2d Cir. 1975); *cf. William Danzer & Co. v. Gulf & Ship Island R. R. Co.*, 268 U.S. 633, 637 (1925).

[12] *E.g., Cooper v. General Dynamics*, 533 F.2d 163 (5th Cir. 1976) *aff'g*, 378 F. Supp. 1258 (D. Vt. 1974); *Williams v. Southern*

The vagueness doctrine, as a fifth amendment due process standard, requires that a statute be precise and definite enough upon its face to give fair warning that certain conduct is proscribed. *E.g., Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Connally v. General Const. Co.*, 269 U.S. 385 (1926). The vagueness doctrine, while most often invoked in the context of a criminal statute, is applicable with equal force and validity to a civil statute. *E.g., Jordan v. DeGeorge*, 341 U.S. 223, 231 (1950); *Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239 (1925); *see Miller v. Strahl*, 239 U.S. 426 (1915); *cf. Boyce Motor Lines v. United States*, 342 U.S. 337 (1952); *United States v. Darby*, 312 U.S. 100

Union Gas Co., 529 F.2d 483 (10th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3361 (U.S. Nov. 16, 1976) (No. 75-1511); *United States v. City of Albuquerque*, 13 FEP Cases 1564 (10th Cir. 1976) *aff'g*, 10 FEP Cases 771 (D. N.M. 1975); *Young v. Southwest S & L Ass'n*, 509 F.2d 140 (5th Cir. 1975); *Roberts v. Hermitage Cotton Mills*, 498 F.2d 1397 (4th Cir. 1974) *aff'g*, 8 FEP Cases 315 (D. S.C.); *Yott v. North Am. Rockwell*, 501 F.2d 398 (9th Cir. 1974); *Bradington v. International Business Machs. Corp.*, 492 F.2d 1240 (4th Cir. 1974) *aff'g*, 360 F. Supp. 845 (D. Md. 1973); *Burns v. Southern Pac. Transp. Co.*, 11 FEP Cases 1441 (D. Ariz. 1976); *Ward v. Allegheny Ludlum Steel Corp.*, 397 F. Supp. 375 (W.D. Pa. 1975); *Olds v. Tennessee Paper Mills*, 11 FEP Cases 350 (E.D. Tenn. 1974); *Dixon v. Omaha Pub. Power Dist.*, 385 F. Supp. 1382 (D. Neb. 1974); *Weitkenaut v. Goodyear Tire & Rubber Co.*, 381 F. Supp. 1284 (D. Vt. 1974); *Shaffield v. Northrop Worldwide Aircraft Servs. Inc.*, 373 F. Supp. 937 (M.D. Ala. 1974); *Fischer v. Alsing*, 7 FEP Cases 220 (D. Ore. 1974); *Drum v. Ware*, 7 FEP Cases 269 (W.D. N.C. 1974); *Claybaugh v. Pacific Northwest Bell Tel. Co.*, 355 F. Supp. 1 (D. Ore. 1973); *Dawson v. Mizell*, 325 F. Supp. 511 (E.D. Va. 1971).

A review of the case law on religious discrimination indicates that each case is judged on its specific facts. Collectively, the factors deemed relevant include: 1. The religious needs of the employee; 2. The skills utilized or job performed by that employee; 3. The operational requirements of the employer's business; 4. The size of the employer's work force; 5. The number and availability of employees having similar skills or performing similar tasks to that of the employee who seeks accommodation; 6. The existence of a collective bargaining agreement; 7. The operational necessity of having that employee's work performed in his absence; 8. The effect of accommodation on other employees.

(1941); *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *see generally*, Note, "Due Process Requirements of Definiteness in Statutes," 62 Harv. L. Rev. 77 (1948). Thus, a provision, such as §706(g) Title VII, which subjects those in violation thereof to damages, *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), must give adequate notice so that liability could have been avoided by appropriate conduct.

This due process concept is particularly important in the context of §701(j) which imposes an affirmative duty upon an employer to take action by reasonably accommodating his employee's religious needs. Thus, under §701(j) the employer is required to take positive, affirmative action rather than merely to refrain from prohibited conduct. Viewed, therefore, as a guide to an employer's future conduct, §701(j) of the Act falls short of the mark for it is a law ". . . requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964).

It is a further premise that due process requires that the judicial determination of rights and duties "be governed by rules of sufficient objectivity to guard against an arbitrary or *ad hominem* result." 62 Harv. L. Rev. at 77. In this due process context, § 701(j) of the Act is inadequate as a guide to adjudication insofar as courts ". . . are free to decide without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966); *Ricks v. District of Columbia*, 414 F.2d 1097, 1101 (D.C. Cir. 1968). The *ad hoc* opinions, rendered in religious discrimination cases,[13] which do not establish any pattern of consistency in the application of § 701(j), indicate that this statute fails miserably as a guide to adjudication. *E.g., compare, Johnson v. United States Postal Serv.*, 497 F.2d 128

[13] *See* n. 12 *supra*.

(5th Cir. 1974), *aff'g* 364 F. Supp. 37 (N.D. Fla. 1973), *and Roberts v. Hermitage Cotton Mills*, 498 F.2d 1397 (4th Cir. 1974), *aff'g* 8 FEP Cases 315 (D.S.C. 1973) *with Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33 (8th Cir. 1975).

Section 701(j) of Title VII runs afoul of the due process requirements mandated by the fifth amendment and the case law thereunder—it fails as a guide to both the future conduct of the employers it regulates, and as a guide to the courts which are required to adjudicate its meaning. Therefore, § 701(j) is constitutionally infirm under the fifth amendment.

III

An Initial Duty of Self-Accommodation Is Imposed Upon an Employee Who Seeks Accommodation of His Religious Needs.

Distinct from sex or race discrimination, religious discrimination is dependent upon the existence of intangible concepts uniquely known, at the onset, only by the alleged discriminatee. While an employer is capable of visually ascertaining sex or race, religious affiliation and precepts cannot be detected by the senses. Due to this very critical distinction, a duty of "self-accommodation" must be imposed, in the first instance, upon an employee who claims that his religion conflicts with his work obligations. Additionally, because the reasonable accommodation of an employee's religion necessarily requires his active participation and assistance, it is both logical and fair that an employee should be required to assert his best efforts.

This duty arises by necessary implication, and is a corollary to the duty of reasonable accommodation imposed by § 701(j) of Title VII. As the parameters of the duty of reasonable accommodation are not articulated with certainty, it is of importance that this Court determine, for the guidance of all em-

ployers, the legal standard applicable when an employer is confronted with a request for the modification of contractual work standards and hours. Additionally, as this case is one of first impression in this Court, and will serve as a guide to future adjudications, a comprehensive delineation of the requisites of the duty of reasonable accommodation is warranted. Thus, this case, akin to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), will govern the nature of proof required in religious discrimination actions.

The duty of "self-accommodation" suggested herein includes the fourfold obligation of an employee to: 1. Promptly notify his employer of his claimed affiliation and the tenets of his religion; 2. Provide his employer with documentation or the means to verify the claimed religious affiliation and the tenets of the religion which conflict with his work obligations; 3. Participate in the formulation of a program or method of reasonable accommodation and 4. Cooperate in implementing the accommodation.

As an initial step, it is obviously necessary that an employee who seeks accommodation of his religious needs, promptly inform his employer of his religious affiliation and the tenets of his faith which conflict with work obligations. Without this information it would be impossible for an employer to know to reasonably accommodate the employee.

Secondly, it is certainly reasonable to require an employee to present documentation of, or provide his employer with the means to verify his claimed affiliation with a religious sect and the tenets of his faith. Without such information, an employer could not reasonably assure himself that the claim is bona fide rather than an attempt to avoid work obligations. The requirement of this documentation is certainly reasonable when accommodation may require a shift change or an excuse

from work in contravention of a collective bargaining agreement including its seniority provisions.[14]

Thirdly, insofar as only the employee seeking accommodation is familiar with the dictates and requirements of his faith, he should be required to participate in formulating a plan of accommodation. Lastly, the employee himself must, on a continuing basis, cooperate fully with his employer in implementing a plan of accommodation.

This Court should take cognizance of the fact that the duty of reasonable accommodation is not a unilateral duty imposed solely upon the employer. Rather, this duty is bilateral and the employee must, as a minimum, fulfill the obligations enumerated herein. *See United States v. City of Albuquerque*, 13 FEP Cases 1564 (10th Cir. 1976) *aff'g*, 10 FEP Cases 771 (D. N.M. 1975). If the employee fails in the fulfillment of any aspect of his duty of "self-accommodation" it surely would be an injustice to impose liability upon his employer, absent a showing that the employer's actions precluded performance by the employee.

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[14] It should be noted that the employer, by dealing directly with the employee, represented by a collective bargaining agent, may be committing an unfair labor practice proscribed by the National Labor Relations Act, 29 U.S.C. § 151 *et seq*. Thus, this documentation is also needed in order to provide an employer with evidence if an unfair labor practice charge is filed.

CONCLUSION

For the foregoing reasons, Chrysler Corporation, as *amicus curiae*, respectfully submits that this Honorable Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 75-1126

TRANS WORLD AIRLINES, INC.,

Petitioner

vs.

LARRY G. HARDISON, ET AL.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR AMICUS CURIAE, WORLDWIDE CHURCH OF GOD

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 75-1126

TRANS WORLD AIRLINES, INC.,
Petitioner,
vs.
LARRY G. HARDISON, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

BRIEF FOR THE WORLDWIDE CHURCH OF GOD, AMICUS CURIAE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

INTEREST OF THE AMICUS CURIAE

The Amicus Curiae is a non-profit religious corporation, headquartered in Pasadena, California, of which the respondent, Mr. Larry G. Hardison is a baptized member.

The Worldwide Church of God teaches among its doctrines the observance of the seventh day Sabbath from Friday sunset to Saturday sunset, as well as the observance of seven annual holy days during the year.

The petitioner has challenged the constitutionality of the religious accommodation provision of Title VII of the Civil Rights Act of 1964. The decision of this court on said challenge is of direct interest to the members of the Worldwide Church of God scattered throughout the United States.

Amicus Curiae has secured the written consent of the parties to filing a brief in the case. Copies of said written consent have been filed with the Office of the Clerk.

ARGUMENT

I.

Facts Regarding The Worldwide Church of God

This amicus curiae will not extensively argue the law in this brief. This is being more than adequately dealt with in the briefs of the parties and the other amici. This amicus curiae instead wants to primarily focus in on certain practical facts for the court's consideration in applying the law to the case.

The Worldwide Church of God has historically observed the seventh day Sabbath and certain annual holy days during which its members refrain from secular labor. The Church presently has over 36,000 baptized member heads-of-households in the United States who will be affected directly or indirectly by the decision of this Court in this matter.

Like the Orthodox Jewish community, the Seventh-day Adventist adherents, and the members of many other minority religious organizations and beliefs, the members of the Worldwide Church of God have endeavored over the years to carve out a share of the American dream in a society that is basically geared to the major religions and to secularism. For these people, the decision of this court on the issues before it is not a matter of constitutionality or unconstitutionality of the accommodation provision of Title VII. Rather, it is a matter of bread and butter.

The Worldwide Church of God has always followed the policy, based upon biblical principles, of urging its members to strive diligently to be profitable and valuable employees for their employers. "Servants, obey in all things your masters according to the flesh; not with eyeservice, as men-pleasers; but in singleness of heart, fearing God: and whatsoever you do, do it heartily, as to the Lord, and not unto men." (Col. 3:22-23).

Based on the foregoing principles, the Church teaches its members that they should make every effort to accommodate to the needs of their employers, short of compromising with what they understand to be the commands of God. When, of course, the requirements of their employment conflict with the commands of God, then they are taught, "we ought to obey God rather than man." (Acts 5:29).

The Church does not teach total arbitrariness in refusal to work, in the face of a legitimate emergency. Rather, in accordance with the "ox-in-the-ditch" principle taught by Jesus, the Church teaches its members that an employee should be willing to work in the case of an emergency. (Luke 14:5).

Our experience in the vast majority of cases, has been that when a conflict arises between a member's job and an employer's requirements, the matter cn be worked out without any undue hardship on the employer. In fact, most employers have worked out a reasonable accommodation to the mutual satisfaction of everybody. However, if the requested accommodation is denied, for the vast majority of the members of the Worldwide Church of God, it is not a question of a choice between their religion or their job. They have already made that choice. It means, simply, that the member will be looking for other employment in order to maintain his and his family's livelihood.

Our experience has also been that, in many cases, the problem is only a one-time situation. That in such cases an employee may have worked for many years without any problem. That a problem arises on only one occasion and the employee is discharged. The accommodation requirement of the law is needed to prohibit such arbitrary dismissals.

The members of the Worldwide Church of God are also advised to work through and cooperate with their local union as much as possible to obtain accommodation. Unfortunately, in many cases, the unions have considered the members' religious accommodation requirements to be antagonistic to their union interests. In many cases, the unions have not only not been helpful, but have, in fact, been the source of discrimination and have pressured the employer to the same end.

This amicus curiae is not seeking a federal handout for its members. It is only seeking that its members be given a somewhat even chance with others in the employment market. In the earlier days of the nation, when the population was largely rural, agrarian, and composed of single-family businesses, there was perhaps less need for concern for the economic status of minority religious members since a farmer or single-family businessman was basically free to decide his own days and hours.

However, in our modern, complex industrialized society, where a large percentage of the work opportunities exist only in streamlined, assemblyline complexes, it becomes a compelling interest of the state to assure equal employment opportunity for all members of the society, regardless of their race, or religion, sex, color or national origin, where the same can be done without an undue hardship on the employer.

II.

The Religious Accommodation Provision Of Title VII Is Constitutional.

The Civil Rights Act of 1964, as amended, provides in Section 703(a) that:

"It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunitites or otherwise adversely effect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

The Act was amended in 1972 to provide the following definition of religion:

"The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." [42 U.S.C. § 2000e(j)].

The Supreme Court of the United States has discussed the meaning of the "Establishment of Religion" clause of the First Amendment on many occasions. In the case of **Everson v. Board of Education,** 330 U.S. 1, 91 L.Ed. 711, (1947), the court stated that:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' **Reynolds v. U.S.,** supra (98 U.S. at 164, 25 L.Ed. 249)."

In the case of **Walz v. Tax Commission,** 397 U.S. 664, 25 L.Ed. 2d 697, 701 (1970), the court said:

"It is sufficient to note that for the men who wrote the Religious Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support and active involvement of the sovereign in religious activity."

The court went on to state, however, that:

"The court has struggled to find a neutral course between the two religion clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other. For example, in **Zorach v. Clauson,** 343 U.S. 306, 96 L.Ed. 954, 72 S.Ct. 679 (1952), Mr. Justice Douglas, writing for the court, noted:

'The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State.' Id., at 312, 96 L.Ed. at 961.

'We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.' Id., at 313, 96 L.Ed. at 962.

• • •

"The course of Constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principal deductible from the First Amendment and all that has been said by the court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts, there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." **Walz v. Tax Commission,** 797 U.S. 664, 25 L.Ed. 697, 701-702 (1970).

This court has established a three-part test as to whether a statute offends the establishment clause. That is, (1) it must have a primarily secular purpose, (2) its primary effect must neither advance nor inhibit religion, and (3) it must not foster excessive government entanglement with religion. **Lemon v. Kurtzman,** 403 U.S. 602, 612-13, 29 L.Ed. 2d 745, 755 (1971).

Does the requirement of "reasonable accomodation" offend the "establishment of religion" prohibition as enunciated in the above-quoted cases? Based upon

Supreme Court decisions construing the "establishment of religion" clause, we believe that the definition of religion as embodied in the 1972 Amendments to the Civil Rights Act is clearly constitutional.

We would first point out that statutes are to be construed so as to avoid finding of unconstitutionality. **U.S. v. Harriss,** 347 U.S. 612, 619 (1954).

It should be noted that Congress, in outlawing discrimination on the basis of religion, did not single out religion as the sole basis for which discrimination was forbidden. It also included "race, color, sex, or national origin." The purpose of Congress was "to further promote equal employment opportunities for American workers." See **Legislative History of the Equal Employment Opportunities Act of 1972,** published by the U.S. Government Printing Office, page 1573.

As the Fifth Circuit has stated on a number of occasions, discrimination in employment opportunities is "one of the most deplorable forms of discrimination known to our society, for it deals not with just an individual's sharing in the 'outer benefits' of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies or chooses." **Rowe v. General Motors Corp.,** 457 F.2d 348, 354, (5 Cir. 1972); **Culpepper v. Reynolds Metals Co.,** 421 F.2d 888, 891 (5 Cir. 1970); **Huff v. N.D. Cass Co. of Alabama,** 485 F.2d 710, 713 (5 Cir. 1973).

The Supreme Court has held on many occasions that the First Amendment does not put religion totally outside the control of the government. For instance, in **Reynolds v. U.S.**, 98 U.S. 145 (1879), the court held that religious beliefs cannot be accepted as a justification of an overt act made criminal by the law of the land, and that legislation prohibiting bigamy is within the power of Congress.

In pursuing a "course of constitutional neutrality," the Supreme Court has found various laws to be constitutional and not "an establishment of religion" even though such laws may confer some benefits on certain religions and infringe to some degree upon the practice of others. **McGowan v. Maryland,** 366 U.S. 420 (1961); **Gallagher v. Crown Kosher Super Market,** 366 U.S. 617 (1961); **Two Guys from Harrison-Allentown v. McGinley,** 366 U.S. 582 (1961); **Braunfeld v. Brown,** 366 U.S. 599 (1961). The laws in these cases were found to have a **civil** or **non-religious** purpose for the benefit of society.

Even in the case of **Everson v. Board of Education,** 330 U.S. 1, 91 L.Ed. 711 (1947), already quoted from above, the Supreme Court, although speaking strongly against establishment of religion, held that providing public transportation to and from private and parochial schools, as well as to and from the public schools, did not infringe upon the establishment of religion clause.

In Zorach v. Clauson, 343 U.S. 306, 96 L.Ed. 954 (1952), the Supreme Court held that a program providing for "released time" for public school pupils to leave the school and go to their religious sanctuary, did not violate the establishment of religion clause of the First Amendment. In that case, the Court specifically held that ". . . separation of Church and state . . ." does not mean ". . . that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people." 343 U.S. at 315.

In Tilton v. Richardson, 403 U.S. 692, 29 L.Ed.2d 790, and again in **Roemer v. Board of Public Works of Maryland** ....U.S. ...., 49 L.Ed.2d 179, 44 L.W. 4909 (1976), the Supreme Court held that an act which provided financial assistance to church related institutions for legitimate secular objectives of assisting and providing necessary facilities for higher education, did not violate the establishment clause, although some benefits accrued to such institutions.

Perhaps the most analogous statutory provision to that under consideration here is that of the Military Selective Service Act providing for exemption of those who "by reason of religious training and belief" are "conscientiously opposed to participation in war in any form." 50 U.S. C.A., Appendix, Section 456(j). The authority for said exemption comes only from acts of Congress. **U.S. v. MacIntosh,** 283 U.S. 605, 624 (1931).

Yet, the Supreme Court on several occasions, has upheld the constitutionality of said exemption against the contention that it was a law "respecting an establishment of religion." Selective Draft Law Cases, 245 U.S. 366, 389-390; **U.S. v. Seeter,** 380 U.S. 163, 188 (Douglas concurring) (1965); **Gillette v. U.S.,** 401 U.S. 437; **George v. U.S.,** 196 F.2d 445, 449 (9 Cir. 1952).

The government is to be **neutral** toward religion, not its adversary. **Everson v. Board of Education,** 330 U.S. 1, 91 L.Ed. 711, 724 (1947). The definition of religion as embodied in the 1972 Amendments to the Civil Rights Act is within the "play in the joints" language of Everson, supra.

Actually, rather than establishing religion, the 1972 Amendment to the Civil Rights Act, defining religion, has the desired effect of extending the free exercise clause of the First Amendment to the area of employment practices, insofar as such free exercise does not impose an undue hardship on the employer. This is in fact what Congress intended.

Senator Jennings Randolph of West Virginia, in comments before the United States Senate regarding the above-mentioned amendment, stated:

"The term 'religion' as used in the Civil Rights Act of 1964, encompasses, as I understand it, the same concepts as are included in the First Amendment — not merely belief, but also conduct; the freedom to believe, and also the freedom to act.

"I think that in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in federal, state, or local governments.

• • •

"I think this is an appropriate time for the Senate, and hopefully the Congress of the United States, to go back as it were to what the Founding Fathers intended. The complexity of our industrial life, the transition of our whole area of employment, of course are matters that were not always understood by those who led our Nation in earlier days." (**Legislative History of the Equal Employment Opportunity Act of 1972,** page 713.)

There is no prohibition in the First Amendment prohibiting Congress from extending the free exercise of religion to those areas of commerce which are under Congressional power to regulate. Senator Harrison A. Williams, Jr. of New Jersey, Chairman of the Senate Committee on Labor and Public Welfare, and chief sponsor of the Senate bill amending the Civil Rights Act, stated:

"As I read the First Amendment of the Constitution, there is no problem here presented by the amendment in connection with the first clause:

'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.'

"In dealing with the free exercise thereof, really, this promotes the constitutional demand in that regard." (**Legislative History of the Equal Employment Opportunity Act of 1972,** page 715.)

In fact, if Congress, while affirmatively prohibiting discrimination on the basis of race, color, sex, or national origin, failed to prohibit discrimination on the basis of religion, this might be a violation of the equal protection of the laws clause of the Fifth Amendment. **Steele v. L. & N.R. Co.,** 323 U.S. 192, 208-209 (1944); **Bolling v. Sharpe,** 347 U.S. 497, 500 (1954).

Thus, it can be clearly seen that the statute here in question meets the requirement of "constitutional neutrality" mandated by the Supreme Court in **Walz. v. Tax Commission,** supra, and **Everson v. Board of Education,** supra.

The statute does not "set up a church." It does not "aid one religion, aid all religions, or prefer one religion over another" in the constitutional sense. It does not "force or influence a person to go or remain away from church against his will or force him to profess a belief or disbelief in any religion." It does not punish anyone "for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance."

Neither does the statute levy any "tax in any amount, large or small . . . to support any religious activities or institutions, whatsoever they may be called or whatever form they may adopt to teach or practice religion." Nor does it cause the federal government to "openly or secretly, participate in the affairs of any religious organizations or groups and vice versa." **Everson v. Board of Education,** 301 U.S. 1, 15 (1947).

III.

Petitioner's Arguments

The brief of the petitioner in this case continually refers to the requirement of accommodation to religious observances and practices as "preferential treatment" of religion. Accommodation according to law is not "preferential treatment" of religion. It is merely the effort of Congress to comply with this court's holding in the case of **Griggs v. Duke Power Co.** 401 U.S. 424 (1971), where the court proscribed "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." (401 U.S. at 431).

Further, the "religious accommodation" provision helps not only those whose "practice" or "observance" is religious, but also requires accommodation when an employee's "practice" or "observance" is based on sincere **atheistic** beliefs. **Young v. Southwestern Savings and Loan Association,** 509 F.2d 140, 142 (1975). It does not, therefore, assist only religion as opposed to non-religion.

The petitioner in its brief attacks only the "religious accommodation — undue hardship" clause of Title VII. (Pet. Br., p. 23). They do not appear to take issue with the provision prohibiting discrimination "because of such individuals . . . religion . . . ." 42 USC, §§ 2000e-2(a) (1) and (2). Their only contention, therefore, seems to be with the wisdom of Congress in determining the **definition** of religion and not merely whether religious discrimination in employment, per se, may be prohibited.

The petitioner argues in their brief that TWA operates on a continuous basis, 24 hours per day, 7 days per week and 365 days each year (Pet. Br., p 36). This may be the case, but nobody works that schedule. Nor does it determine whether or not an employee's religious needs may be reasonably accommodated.

The petitioner argues in their brief that they have thousands of employees with diverse religious practices and that this must indicate that an employer cannot be required to accommodate individual religious preferences. (Pet. Br., page 36). There is no evidence that any of the other thousands of employees sought any religious accommodation, or that, if they did, TWA had any problem whatsoever, accommodating the same. TWA is represented by astute counsel. Obviously, if any such evidence existed, it would be in evidence and argued.

It is a well-known fact that employers constantly, routinely accommodate virtually all their employees from time to time in one way or another by providing for such matters as sickness, jury duty, vacations, funerals, and for numerous other personal matters. See **Claybaugh v. Pacific Northwest Bell Telephone Company,** 355 F.Supp 1, 5 (1973) where the employer had accommodated such things as toastmaster meetings, boy scout meetings, bowling teams, attendance by employees at Oregon State University, etc. TWA has not denied that they routinely provide for the same and similar accommodations. Or is

it merely that providing the other accommodations is not too much of an administrative burden whereas providing an accommodation for an employee based on a religious need is too much?

Is the petitioner's real objection that the statute offends the constitution? Or is petitioner's real objection that the employer has become so large and insensitive to individual employee's needs that it simply does not want to be bothered with having to treat the employees as individuals, but only as numbers and statistics in its labor force.

Sabbath keepers and other minority religious groups have historically been persecuted and discriminated against. If the "religious accommodation" provision of the law is not upheld, will signs begin to appear in employers' windows, "No Sabbath keepers need apply"? Will not Sabbath keepers find it increasingly difficult to find and hold employment? Will not employers be able to discriminate against such persons at their whim? If this comes to pass, Sabbath keepers may well become sojourners and fugitives because of their adherence to their religion.

CONCLUSION

The question here is one of reasonableness. The statute provides for "reasonable" accommodation of religious observance and practice. The petitioner raises numerous arguments in their brief which seem to question the "reasonableness" of the "reasonable accommodation" provision. But the statute itself answers that objection. Congress decided, and legislated, that a reasonable accommodation is one that the employer can make without placing an "undue hardship" upon the business of the employer. What could be more reasonable.

Congress has the right to reasonably regulate commerce. This amicus curiae asks the court to find that this is such a regulation. Therefore, the amicus curiae respectfully urges that the statute is constitutional and the holding of the Eighth Circuit below should be affirmed.

Respectfully submitted,
RADER, HELGE & GERSON

By .....
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PROOF OF SERVICE

STATE OF CALIFORNIA)
ss
County of Riverside)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1509 N. Main, Santa Ana, California.

On February 11, 1977, I served the within AMICUS CURIAE BRIEF FOR WORLDWIDE CHURCH OF GOD on the interested parties in said action, by placing a true copy in a sealed envelope with postage thereon fully prepaid in the United States mail at Santa Ana, California, addressed as follows:

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I CERTIFY under penalty of perjury that the foregoing is true and correct.
EXECUTED on February 11, 1977, at Santa Ana, California.

JACK GALLAGHER

MOTION FILED
FEB 3 1977

Supreme Court of the United States

OCTOBER TERM, 1976

Docket No. 75-1126

TRANS WORLD AIRLINES, INC.,
Petitioner,

against

LARRY G. HARDISON, et al.,
Respondents.

Docket No. 75-1385

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, et al.,
Petitioners,

against

LARRY G. HARDISON, et al.,
Respondents.

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF FOR NEW YORK STATE DIVISION OF HUMAN RIGHTS AS *AMICUS CURIAE*

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Respondents.

Motion.

The New York State Division of Human Rights hereby moves this Court to accept for filing the attached proposed *Amicus Curiae* brief.

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Necessity for Motion.

By letter dated December 7, 1976, Stinson, Mag, Thomson, McEvers and Fizzell, Esqs., counsel for petitioner Trans World Airlines, Inc., declined to consent to the filing of an *amicus curiae* brief by the New York State Division of Human Rights.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 75-1126, 75-1385

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INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, et al.,

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against

LARRY G. HARDISON, et al.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR NEW YORK STATE DIVISION OF HUMAN RIGHTS AS *AMICUS CURIAE*

Interest of the *Amicus Curiae*

The New York State Division of Human Rights is the nation's oldest fair employment practices agency. The Division was created in 1945, in exercise of the state's

police power, for the protection of the public welfare, health and peace of its people, and in fulfillment of the provisions of the Constitution of the State of New York, N.Y. Const. Art. I, § 11, concerning civil rights. 1945 N.Y. Laws, ch. 118. Over the years, the jurisdiction of the Division has been enlarged; its jurisdiction over discrimination specifically based upon the day(s) of one's religious observance derives from legislation which became effective September 1, 1967. 1967 N.Y. Laws, ch. 667; amended September 1, 1971. 1971 N.Y. Laws, ch. 674. The Division's jurisdiction over employment discrimination based upon day(s) of religious observance includes hiring, discharge, and terms, conditions and privileges of employment. N.Y. Executive Law, Art. 15 (Human Rights Law) § 296.1(a) (McKinney).

Under the present New York statute, it is "an unlawful discriminatory practice for any employer to prohibit, prevent or disqualify any person from, or otherwise to discriminate against any person in, obtaining or holding employment, because of his observance of any particular day or days or any portion thereof as a sabbath or other holy day in accordance with the requirements of his religion." *Id.*, § 296.10(a). The 1967 version of this provision proscribed employment discrimination by public employers. This proscription was extended in 1971 to private employers as well.

The major exception and the one pertinent to the instant case, permits a private employer to discriminate against an individual based upon the day(s) of his religious observance "where the uniform application of terms and conditions of attendance to employees is essential to prevent undue economic hardship to the employer." However, as is the case with the other exceptions as well, the employer has the burden of proving his entitlement thereto. *Id.*, § 296.10(c).

The Division's interest in the instant case derives from the substantial similarity of the above statute to the federal provision at issue, 42 U.S.C. §§ 2000e(j), 2000e-2(a)-(d). In both statutes, the same wrong is addressed,* parallel exception is carved out, the burden of proof is on the same party, and a similar result is contemplated.

The Division files this brief to express its interest in a narrow construction of the "undue hardship" exception contained in both statutes. The Division submits that an employer should not be permitted to avoid its duty to accommodate an employee's required days of religious observance by citing as undue hardship a prior seniority system agreement.

In addition, the Division argues in this brief that the court below was correct in its interpretation of the employer's burden of proof. The court properly distinguished the imagined threat of a feared hardship from the proof of an actual one. This accords with the position of the Division in similar cases, that an employer must offer a detailed showing of how much of a burden the accommodation entails.

An affirmance by this Court would provide a consistent interpretation to the federal and state prohibitions against religious discrimination in employment.

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* The federal provision is somewhat broader in coverage, protecting religious practice generally whereas the New York statute's protection is limited to time off for religious observance. However, that difference is not pertinent here, because the case before the Court involves the applicability of the federal provision to time off for religious observance.

ARGUMENT

POINT I

A collective bargaining agreement may not be relied upon as a defense to establish the existence of an undue hardship on the conduct of the employer's business.

Prior to the 1972 amendment of 42 U.S.C. § 2000e, the question whether an employer had a duty to accommodate an employee's religious observance was a matter of statutory construction. *Compare Riley* v. *Bendix,* 464 F.2d 1113 (5th Cir. 1972), *with Kettel* v. *Johnson & Johnson,* 337 F. Supp. 892 (E.D. Ark. 1972). The mandate not to "discriminate", contained in § 2000e-2(a) thru (d), required constant judicial reevaluation of many practices long ingrained in employer-employee relationships. *See, e.g., Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971). The amendment, however, defined that mandate in regard to religious observance by specifically establishing a duty reasonably to accommodate to an employee's needs until the point of "undue hardship on the conduct of the employer's business". 42 U.S.C. § 2000e(j), Pub. L. 92-261, § 2, Mar. 24, 1972, 86 Stat. 103.

The interpretation of the amendment contended for by appellants would require the Court to find that an employer's duty to accommodate is obviated if it is party to a collective bargaining agreement which arguably prevents such accommodation. Such an interpretation would permit rights established by the statute to be bargained away and, in a circular process of self-serving, would also permit the terms of the collective bargaining agreement to be asserted as creating the "undue hardship" which relieves the employer from the necessity to accommodate. This is clearly contrary to settled principles of Title VII law. *See, e.g.,*

Local 189, United Papermakers and Paperworkers v. *United States,* 416 F.2d 980 (5th Cir. 1969), *cert. den.,* 397 U.S. 919 (1970).

Far from allowing the seniority terms of a collective bargaining agreement to comprise a defense of undue hardship, the thrust of Title VII has been to hold both union and employer responsible for any discrimination resulting from the contract.

> "The rights assured by Title VII are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert. Title VII requires that both union and employer represent and protect the best interests of minority employees . . . [I]f a discriminatory contract provision is acceded to, the bargainee as well as the bargainor will be held liable." *Robinson* v. *Lorillard Corp.,* 444 F.2d 791, 799 (4th Cir. 1971)

Accord, e.g., United States v. *N. L. Industries, Inc.,* 479 F.2d 354 (8th Cir. 1973); *United States* v. *Hayes Int'l Corp.,* 456 F.2d 112 (5th Cir. 1972).

Indeed, the courts have not hesitated to drastically revise discriminatory seniority systems embodied in collective bargaining agreements, *e.g., United States* v. *Bethlehem Steel Corp.,* 446 F.2d 652 (2d Cir. 1971), and to award back pay to class members affected by discriminatory terms of collective bargaining agreements, *e.g., Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975). Additionally, union employees have been held to have "no vested interest in their seniority that precludes the application of laws designed to eradicate . . . discrimination." *Williams* v. *Norfolk and W. Ry. Co.,* 530 F.2d 539, 542 (4th Cir. 1975).

An interpretation permitting an employer to avoid the duty to accommodate by citing as undue hardship a prior collective bargaining agreement is clearly inconsistent with

the purposes of § 2000e(j), which was enacted to overcome the effect of *Dewey* v. *Reynolds Metal,* 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam,* 402 U.S. 689 (1971). See legislative history at 118 Cong. Rec. 705 (1972). Congress could not have been unaware of the bona fide seniority system exception contained in § 2000e-2(h) when it created the undue hardship exception of § 2000e(j). To read the former as governing the latter would render § 2000e(j) a virtual nullity, a result entirely precluded by the basic rule of statutory construction that effect must be given to all parts of a statute where possible. *See, Morton* v. *Mancari,* 417 U.S. 535 (1974); *Abell* v. *United States,* 518 F.2d 1369 (Ct. Cl. 1975); 82 C.J.S. *Statutes* § 346. The later specific enactment contained in § 2000e(j) must be preserved against the earlier general enactment in § 2000e-2(h). *Morton* v. *Mancari, supra.* Both sections are fully effectuated if § 2000e-2(h) is construed as applying only to those bona fide seniority practices which do not prevent the reasonable accommodation to religious observance required by § 2000e(j).

POINT II

To satisfy its burden of proof, an employer must make a detailed showing of the undue burden which the accommodation entails.

Section 2000e(j) requires reasonable accommodation to an employee's religious practice unless the employer can demonstrate that such accommodation would impose undue hardship on the conduct of its business. The cases which have considered this provision have been consistent in requiring the employer to make a detailed showing of a severe and immediate burden.

Thus it has been held that the objections and complaints of employees required to substitute for a Saturday Sabbath observer do not, in and of themselves, constitute un-

due hardship. *Cummins* v. *Parker Seal Co.,* 516 F.2d 544, 550 (6th Cir. 1975).

In *Draper* v. *United States Pipe & Foundry Co.,* 527 F.2d 515 (6th Cir. 1975), the court said:

> "[A]n employer does not sustain his burden of proof merely by showing that an accommodation would be bothersome to administer or disruptive of the operating routine. In addition, we are somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that never has been put into practice. The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted." At 520.

"Undue hardship" is the functional equivalent of "business necessity" as the latter doctrine is applied in Title VII law. "Business necessity" has evolved as a defense to liability for discriminatory practices which are necessary to enable a business to operate safely and efficiently. *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971); *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211, *rehearing denied,* 494 F.2d 1296 (5th Cir. 1974); *United States* v. *Bethlehem Steel Corp.,* 446 F.2d 652 (2nd Cir. 1971). Similarly, § 2000e(j) expressly defines "religion" to permit the existence of discriminatory practices so long as they can be justified on the basis of "undue hardship" on the conduct of the employer's business. As with business necessity, the undue hardship defense is a burden of the employer's proof.

> "The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any [discriminatory] impact; the challenged practice must effectively carry out the busi-

ness purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential [discriminatory] impact." *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971).

Accord, *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973); *Rowe* v. *General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972).

An employer asserting undue hardship as a defense should be held at least to the same strict standard of proof as if the defense were business necessity. Title VII creates a federal statutory right in an employee to be accommodated in given circumstances according to his religious needs. Even a real and present threat by co-workers to disrupt the employer's operations in order to induce the employer to refuse to recognize that right should not be countenanced as justification for such refusal. Federal rights "are not to be sacrificed or yielded . . . to violence and disorder. . . ." *Cooper* v. *Aaron*, 358 U.S. 1, 16 (1958).

When the threat of co-employee discontent is merely a matter of speculation, as in the instant case, the employer must be held to have failed to carry its burden of proof. *See, Robinson* v. *Lorillard Corp., supra,* at 799 (economic cost of a strike over a discriminatory contract provision is insufficient to constitute business necessity).

Conclusion

This case offers the Court an opportunity to affirm the right of each citizen to obtain and continue employment without fear of discrimination based upon the days of his religious observation. By specifically holding that the

employer's burden of proof is not satisfied by the mere existence of a collective bargaining agreement, but instead requires a detailed showing of the facts which render accommodation an undue hardship, this Court would provide an interpretation establishing consistent employer obligations under both federal and state statutes, and would thereby promote effective enforcement of Title VII rights.

The decision of the Court of Appeals should be affirmed.

Dated: New York, New York, February 14, 1977.

Respectfully submitted,

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FOR ARGUMENT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 75-1126

TRANSWORLD AIRLINES, INC.,
Petitioner

vs.

LARRY G. HARDISON, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 142 and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 1650.
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1126

TRANS WORLD AIRLINES, INC.,

Petitioner

vs.

LARRY G. HARDISON, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 142 and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 1650,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

Brief of Amicus Curiae State of Michigan

INTEREST OF THE AMICUS CURIAE.

The State of Michigan through its Attorney General, as amicus curiae, in concurrence with the long-standing, publicly stated view of the Michigan Civil Rights Commission (CRC) respecting reasonable accommodation, submits this brief pursuant to Rule 42.4 of this Court.

The State of Michigan has been committed to the preservation of the civil rights of individuals from the time of the Northwest Ordinance, which Act contained substantial guarantees of individual freedom. Foremost among those rights was freedom of religion.

Michigan has had an extensive fair employment practices act since 1955, the enactment of which predated the passage of Title VII by nine years. That Act prohibited religious discrimination in employment and created a Civil Rights Commission (CRC) to enforce its provisions.

As a leader in the area of civil rights and individual freedoms Michigan has gone a step further than other state civil rights agencies. The CRC was created by Michigan's 1963 Constitution and was granted the power to secure equal protection of civil rights in Michigan. The amicus and the highest Court of this state have ruled the CRC to be free of judicial or legislative interference with respect to the performance of its designated functions. It is thus believed that Michigan's Civil Rights Commission is fully empowered to impose a reasonable accommodation requirement.

A further indication of Michigan's strong public policy regarding civil rights is reflected in the view of its Supreme Court that the CRC may look to federal law as a source of the civil rights it is charged with securing. One indication of the CRC's reliance on federal law was its September 26, 1972 adoption of the federal Equal Employment Opportunity Commission's religious accommodation guidelines of 1967. Both prior to and since that time its support staff has consistently sought to require reasonable accommodations to the religious needs of Michigan employees.

From the time the CRC determined to apply a reasonable accommodation requirement, it has been accepting complaints

of religious discrimination because of the failure of employers and unions to make reasonable accommodations to employee's religious needs. Four of these complaints were not otherwise administratively resolved and have been brought before the CRC for adjudication. In each, the finding has been for the complaining employee; specifically that the employer's failure to make a reasonable accommodation entailed unlawful religious discrimination under Michigan law. Three of these determinations have been taken to Michigan's circuit courts on appeal. One of these cases is substantially on all fours with the instant case.

It is thus readily apparent that the instant matter raises issues which potentially will have a significant impact on the hire, tenure, terms, conditions or privileges of employment in Michigan. The amicus further believes that the outcome of this litigation will be so pervasive as to greatly affect the state's efforts to eliminate religious discrimination in employment. An adverse decision herein will remove the persuasive authority of federal law which the CRC has so heavily relied upon in the area of religious accommodation.

For the above stated reasons, the amicus files this brief in support of respondent Hardison.

SUMMARY OF ARGUMENT

This case involves the question of whether employers and unions may constitutionally be required to make reasonable accommodations of the religious observances or practices of employees or prospective employees. Along with eleven other states, Michigan has adopted the Equal Employment Opportunity Commission's guidelines which require such accommodation and, through its constititutionally-established Civil Rights Commission. Michigan has consis-

tently enforced such reasonable accommodation. Believing that such reasonable accommodation is necessary in order to protect the religious freedom of its employee-citizens, the State of Michigan respectfully submits that the policies which underlie this enforcement are equally applicable to the instant case and that this Court should uphold the challenged statute.

The requirements of 42 USC § 2000e(j) do not violate the Establishment Clause and, according to the principles of statutory construction, the statute should be upheld. Allowing employees to remain gainfully employed while continuing to observe a Saturday Sabbath is a reasonable accommodation which is necessary to effectuate religious freedom and does not constitute an unconstitutional imposition on employers or unions.

ARGUMENT I

MICHIGAN HAS CONSISTENTLY ENFORCED REASONABLE ACCOMMODATION OF EMPLOYEES' RELIGIOUS OBSERVANCES, AND THIS STATE'S LONG HISTORY OF LEADERSHIP AND EXPERTISE IN THE AREA IS PERSUASIVE EVIDENCE OF THE VALIDITY OF ITS CONCLUSIONS REGARDING THE REASONABLE ACCOMMODATION REQUIREMENT.

On a matter of the complexity of that presented to the Court in the instant case, there are obviously many arguments to be made on each side of the issues raised by the Petition for Writ of Certiorari. This amicus has determined that these issues have been, and will be, exhaustively briefed by the parties and other amici. It is thus the intent of this brief to, for the most part, advise the Court as to the policy reasons for affirming the Court of Appeals for the Eighth Circuit and for upholding the principle of reasonable accommodation. Further, the brief will set forth the importance that the concept of individual rights has taken on in today's world, both in Michigan and the federal arena, particularly with respect to equal umployment opportunities, and the devastating impact an adverse decision herein will have on the freedom of Michigan employees, and employees throughout the country, to assert their civil right of freedom from religious discrimination in employment.

The State of Michigan has been traditionally known as a leader in the field of individual and civil rights. Its guarantees of individual freedoms have been reduced to writing since the time of the Northwest Ordinance. Its assurances of religious freedom have formed an important part of the jurisprudence of the state. Indeed, section 1 of the Michigan State Fair Employment Practices Act (FEPA), MCLA §423.301; MSA §17.458(1), declared in 1955, nine years

before there was a federal guarantee of equal employment opportunity, that: "The opportunity to obtain employment without discrimination because of race, color, *religion*, national origin, or ancestry is hereby *recognized as and declared to be a civil right*." (emphasis added) Further, section 3(a) of the FEPA in the same year prohibited religious discrimination in the hire, tenure, terms, conditions or privileges of employment, MCLA §423.303(a); MSA §17.458(3) (a).

Thus, freedom from religious discrimination in employment has been guaranteed in Michigan for over 20 years. The question this court must struggle with in the instant matter is what does that freedom mean? It is the position of the amicus that such religious freedom requires that employers and unions take into account the difficulties Sabbatarians encounter in practicing their religion while remaining gainfully employed.

Michigan's Constitution, Const 1963, art 5, §29 created the Michigan Civil Rights Commission (CRC) and charged it with the affirmative duty of securing equal protection of civil rights in the areas of religion, race, color, and national origin. The accompanying grant of authority to the CRC included not only the right to perform the usual administrative processing of complaints, but also the power, among others which will be mentioned, to conduct full evidentiary hearings on the merits with all the prerogatives incident thereto, a function the federal Equal Employment Opportunity Commission (EEOC) cannot perform.

On September 26, 1972, the CRC, in pursuit of its statutory and constitutional powers, adopted the EEOC's religious discrimination in employment guidelines. They basically required Michigan employers and unions to make reasonable accommodations to the religious needs of

employees, Interpretative Guidelines on Civil Rights Laws, 3 CCH Employment Practices Guide ¶24,235(B)(7), p 8635-7.

The CRC has been vigorously pursuing complaints from Michigan employees alleging religious discrimination in their employer's or union's failure to reasonably accommodate their religious needs. Four of these matters, not otherwise administratively resolved, have been brought before the CRC for adjudication. In each, the finding has been for the complaining employee; specifically that the employer's failure to make a reasonable accommodation entailed unlawful religious discrimination under Michigan law. Three of these determinations thus far have been taken to Michigan's circuit courts for review and/or retrial, although no Michigan court has yet ruled on the merits of these actions.

One of the above mentioned cases is of particular relevance to the matter before this Court. In *Michigan Department of Civil Rights, ex rel, Russell Taylor* v *Ford Motor Co*, Wayne County Circuit Court docket No. 76-601454-AA, the factual setting and issues are of unusual similarity to the instant cause. That matter involves a continuous operation as was true in *Hardison*, the conflict of a shift transfer with Sabbath observance, a low seniority employee, the question of overtime pay, breach of a collective bargaining contract's seniority provisions and an Establishment Clause challenge.

As can be seen, the *Taylor* v *Ford Motor* case is substantially on all fours with the case at bar and the Court's decision in this matter will very likely have a profound impact on the *Taylor* cause.

Similarly, the two other religious accommodation cases in Michigan's courts*, as well as those matters now pending before the CRC or advancing through the administrative process will undoubtedly be affected by this Court's decision. It is thus readily apparent that the instant matter potentially raises issues which will have a significant impact on the hire, tenure, terms, conditions or privileges of employment in Michigan. Each employee or potential employee in Michigan who observes a Saturday Sabbath, or some other Sabbath day or religious practice which conflicts with the usual work week schedule, will likely be in some way affected by this Court's ultimate ruling. The amicus is thus vitally concerned that the issues herein be properly resolved.

As has been emphasized, Michigan has historically been a leader in the area of enforcing freedom from religious discrimination in employment. It is therefore respectfully submitted that the position taken by a state with such an extensive record of protection of individual and civil rights is entitled to the most respectful consideration. Experience in a particular area leads to understanding, appreciation and an ability to analyze the needs of the citizenry. The following is presented to display Michigan's expertise in and commitment to the concept of individual rights.

The State of Michigan declares its public policy in its Constitution, statutes and judicial decisions, *Groehn* v *Corporation & Securities Commission*, 350 Mich 250; 86 NW2d 291 (1957). The public policy regarding individual rights has been consistently to protect them. Such is evidenced by the earliest pronouncements. The Northwest

*The amicus is not aware of other private actions in Michigan's courts which raise the religious accommodation issue. This is not to say, however, that there may not be such actions now pending.

Ordinance 1787, US Rev Stat, 2nd ed, 1878 p 13, art I, II and VI conferred many of the protections later contained in the United States Constitution's Bill of Rights. In 1800 the Northwest Territory was divided into two territories with the Michigan sector becoming part of the Indiana Territory, 2 US Stat, Ch XLI, pp 58-59. Section 2 of said Act preserved the rights conferred under the Northwest Ordinance.

Michigan became a separate territory in 1805, 2 US Stat, Ch V, pp 309-310. Section 2 of that Act secured the rights guaranteed by the Northwest Ordinance and of the Act which divided the Northwest Territory into separate territories. Further, the territory of Michigan agreed, in the preamble of its first Constitution, Const 1835, to form the State of Michigan.

Const 1835, art 1, §§1-4, 6-13 and 15-21 set forth an extensive bill of individual rights which embraced not only the guarantees of the federal Bill of Rights, but others as well. In particular, Const 1835, art 11, §1 prohibited slavery, a prohibition thenceforth continued constititutionally in Michigan. Various enabling provisions led to admission of Michigan as a state of the Union, 5 US Stat At Large 144, 5 US Stat At Large 59.

The State of Michigan in its 1850 Constitution expanded the individual rights conferred by its 1835 Constitution, Const 1850, art 4, §§39, 41-44; art 6, §§26-34; art 15, §15; and art 18, §§2, 7, 9-11 and 14. Const 1908 granted further individual rights to Michigan citizens, including a prohibition on the denial of the right to vote on account of sex, Const 1908, art 2, §§2-5, 7-17, 19-21; art 3, §1; art 11, §9; and art 13, §§1-3.

Finally, Michigan's 1963 Constitution reaffirmed rights then existing and significantly increased the protections and

privileges guaranteed to Michigan citizens, Const 1963, art 1, §§1-6, 8-18, 20-22; art 2, §1; art 4, §46; art 5, §29; art 8, §§2, 8 and art 10, §6. Const 1963 contained such notable provisions as a constitutional prohibition on the death penalty, which had been legislatively abolished since 1846 except for treason, Const 1963, art 4, §46; constitutional creation of the Michigan Civil Rights Commission, Const 1963, art 5, §29; and a prohibition on discrimination in education on account of religion, creed, race, color or national origin, Const 1963, art 8, §2.

The pattern established in Michigan has been to extend those protections deemed necessary to equal treatment of its inhabitants as the need became apparent. As discrimination has become more sophisticated in kind the statutory prohibitions were drafted in a more specific manner, and in addition offered relief for violations thereof, including most importantly, the services of a Michigan Civil Rights agency. Briefly summarized, for the Court's edification, are Michigan's statutory enactments regarding civil rights.

Discrimination in public accommodations has been prohibited in Michigan since the passage of 1885 PA 130, §2. The present provisions regarding this area are MCLA §§750.146, 750.147; MSA §§28.343, 28.344. Similarly, CL 1915, §8418, as amended, MCLA §35.461; MSA §4.1251, barred discrimination in public accommodations, conveyances and public amusement against persons in the military. Disqualification of citizens for jury service because of race or color was first prohibited by 1885 PA 130, §3 and currently encompasses the categories of race, creed or color, MCLA §750.148; MSA §28.345. MCLA §750.147a; MSA §28.344(1) prohibits discrimination in the extension of credit or determination of credit worthiness because of race, color, religion, national origin, marital status, sex or physical handicap.

The FEPA, which originally protected only against discrimination because of race, color, religion, national origin or ancestry, now encompasses the additional categories of age, sex and arrest record. MCLA §423.303a; MSA §17.458(3)(a), MCLA §423.303(e); MSA §17.458 (3)(e).

Discrimination in housing is prohibited in Michigan in the categories of race, color, religion, national origin, sex, marital status, age or handicap by the Fair Housing Act of 1968, MCLA §564.101 et seq.; MSA §26.1300(101) et seq.

Effective April 1, 1977, 1976 PA 453 repeals the FEPA and the Fair Housing Act of 1968. PA 453 prohibits discrimination in employment because of religion, race, color, national origin, age, sex, height, weight, or marital status; prohibits discrimination in public accommodations with respect to the classifications enumerated above except height and weight; prohibits discrimination by educational institutions as to religion, race, color, national origin or sex; and prohibits housing discrimination in the areas of religion, race, color, national origin, age, sex or marital status. Also effective on April 1, is the Michigan Handicappers Civil Rights Act, MCLA §37.1101 et seq.; MSA §3.550 (101) et seq., which affords equal opportunity in employment, housing, public accommodations, public services and educational facilities to persons with a physical or mental handicap. Each of the above described acts has been, or will be enforced by the Michigan Civil Rights Commission under the terms of existing legislation or those enactments effective as of April 1.

Michigan's legislative branch has obviously had substantial experience with civil rights. So too has its executive and judicial branches. The framers of Const 1963, for good and substantial reasons, accorded constitutional status to the CRC. The amicus herein, Michigan's Attorney General,

held as follows in OAG 1963-1964, No. 4161, pp 144-145 (July 22, 1963):

> From a plain reading of Article V, section 29, it is clear that the people have conferred plenary power upon the Civil Rights Commission in its sphere of authority as a constitutional commission to investigate and to secure the enjoyment of civil rights without discrimination. *Plec* v *Liquor Control Commission* (1948), 322 Mich 691.
>
> The authority of the Civil Rights Commission is limited only by the Revised Constitution and the Constitution of the United States. *State* v *Mountain States Telephone and Telegraph Company* (NM, 1950), 224 P. 2d 155.
>
> The grant of power in the Constitution carries with it by implication the authority to do all things necessary and appropriate to accomplish the purpose intended by the people. Thus the Civil Rights Commission created by the people in the Constitution is not limited to the powers expressly granted, and the Commission may exercise all powers necessary and essential in the performance of its duties.
>
> *Board of Supervisors of Atala County* v *Illinois Central Railroad Company* (Miss, 1939), 190 So 241; *Gavey* v *Trew* (Ariz, 1946), 170 P. 2d 845.
>
> * * *
>
> It must follow that within its sphere of authority the Civil Rights Commission is supreme in the exercise of the powers entrusted to it by the people.

As a result of its constitutional stature Michigan's Supreme Court has ruled that the CRC, in *Beech Grove Investment Co* v *Civil Rights Commission*, 380 Mich 405;

157 NW2d 213 (1968), was possessed of the authority to look to federal law as a source of the civil rights which it is charged with protecting. As the FEPA, *supra*, and Title VII's prohibitions on religious discrimination, 42 USC §2000e-2(a)(i), are set forth in substantially the same language, the *Beech Grove* rationale permits the CRC to look to federal law as a source of interpretation of the FEPA's religious discrimination prohibition. The CRC has taken the legal position that it may so look to federal law in interpreting Michigan civil rights law, Interpretative Guidelines on Civil Rights Laws, 3 CCH Employment Practices Guide, ¶24,235, p 8635-5. *Beech Grove* thus allows the CRC to adopt the definition of religion contained in the Civil Rights Act of 1964, 42 USC §2000e(j) (1972).

A further indication of Michigan's commitment to civil rights is displyed by two rulings of its highest court. In *Michigan Civil Rights Commission* v *Clark*, 390 Mich 717; 212 NW2d 912 (1973), the court said:

> . . . The CRC, just as the legislature, Governor and this Court, derives its powers directly from the people under the Constitution.
>
> The Legislature, although it may legislate with regard to the exercise of executive and judicial functions, may not prevent the executive or judicial branches from exercising their powers. *Similarly, the Legislature, although it may legislate with regard to the CRC, may not do so in a manner which prevents the CRC from functioning effectively.* (emphasis added) p 726

That concept was expanded in *City of Ypsilanti* v *Civil Rights Commission*, 393 Mich 253; 227 NW2d 213 (1974), when the Michigan Supreme Court, in overturning a Court of Appeals determination did so for the reasons set forth in

Court of Appeals Judge Danhof's dissent in *City of Ypsilanti* v *Civil Rights Commission*, 55 Mich App 103, 111; 221 NW2d 923 (1974). The rationale set forth was that the *courts and the legislature* should not act in a manner which prevents the CRC from functioning effectively.

The interpretations and actions of a state and its constitutionally-created civil rights organization, which possesses constititutional status and been viewed so affirmatively by the state's highest court and Attorney General should, it is respectfully submitted, be accorded substantial weight by this Court. The considerable experience Michigan possesses in the area qualified it as a state whose voice should be heeded. The fact of the CRC's adoption of the EEOC's religious accommodation guidelines, its decisions with respect thereto and its defending those decisions in the state's courts provide cogent reasons for validating the reasonable accommodation requirement. This is particularly true in light of Michigan's long experience with civil rights and its sensitivity to pockets of discrimination in employment which must be eliminated to achieve the goal of equal employment opportunity.

Also persuasive is the fact that eleven states other than Michigan have adopted the reasonable accommodation requirement in their respective state statutes or administrative regulations, Arizona 3 CCH Employment Practices Guide, ¶20,404 §41-1461.6, p 8128; Colorado, 3 CCH Employment Practices Guide, ¶21,063, p 8221-9; Illinois, 3 CCH Employment Practices Guide, ¶22,498, p 8418; Kansas, 3 CCH Employment Practices Guide, ¶23,079.01, §21-33-1(b), p 8503; Kentucky, 3 CCH Employment Practices Guide, ¶23,203, §344.030(5), p 8519; Maryland, 3 CCH Employment Practices Guide, ¶23,830, p 8567, Massachusetts, 3 CCH Employment Practices Guide, ¶24,005, §4 (1A) p 8586; New York, 3 CCH Employment

Practices Guide, ¶26,007, §296.10(b), p 8890; Ohio, 3 CCH Employment Practices Guide, ¶26,620, p 8952; Pennsylvania, 3 CCH Employment Practices Guide, ¶27,205A, pp 9027-9028; and South Dakota, 3 CCH Employment Practices Guide, ¶27,835.52, p 9145-9. Employers, employees and unions in each of the above states are undoubtedly struggling with the question of reasonable accommodation. It is clearly apparent that the interpretation of a statute by the agency charged with enforcing it is entitled to the most respectful consideration, *Griggs* v *Duke Power Co, infra*.

III

TRUE FREEDOM OF RELIGION REQUIRES A REASONABLE ACCOMMODATION OF AN EMPLOYEE'S OR PROSPECTIVE EMPLOYEE'S RELIGIOUS OBSERVANCES OR PRACTICES

A. THE UNITED STATES HAS HISTORICALLY ACCORDED EQUALITY OF OPPORTUNITY

The Court is of course quite familiar with the efforts of the United States regarding the freedom of its citizens. With a few unfortunate exceptions it has acted with one mind, respecting its constitution and statutes, in securing the rights of individuals. For the sake of perspective, the amicus will very briefly review the constitutional provisions affecting the freedom of Americans.

The historical setting at the time of ratification of the United States Constitution is well known. It then contained no Bill of Rights. The First Congress of the United States, in response to a national outcry thereto, submitted twelve amendments to the states for ratification. Ten of the twelve were accordingly ratified by the requisite three fourths of the

states and became effective. Of those ten, the first eight dealt specifically with protection of the rights of individuals. These amendments were an affirmation of the bills of rights of the individual states then in existence and in essence secured the citizenry against the excesses of government intrusion. Subsequent events revealed the Bill of Rights to be inadequate to accomplish the desired result of freedom for all Americans. It was thereafter deemed necessary to further amend the Constitution to secure additional individual rights. The specific amendments were US Const Amends XIII; XIV, §§1, 5; XV, XXIX; XXIV and XXVI.

These constitutional provisions proved to have shortcomings in effectively protecting the freedoms guaranteed thereby to Americans. For that reason federal civil rights statutes were enacted concerning substantially all endeavors. As this Court is intimately acquainted with such statutes, reference to same will not be made.

It is eminently clear that the United States of American has been and currently is concerned with the ability of its citizens to practice the freedoms granted to them. Of particular importance is freedom of religion as it was one of the cornerstones upon which this country was founded. It should be jealously guarded, particularly when one's employment threatenes to impinge upon it.

> . . . For the loss of a job because of discrimination means more than the loss of just a wage. It means the loss of a chance to learn. Discrimination is a vicious act. It may destroy hope and any trace of self-respect. That, and not the loss of pay, is perhaps the injury which is felt the most and the one which is the greatest.
>
> *Humphrey* v *Southwestern Portland Cement Co,* 369 F Supp 832, 834 (WD Tex, 1973), *rev'd on other grounds,* 488 F2d 591 (5th Cir, 1974) *reh den,* 490 F2d 992 (5th Cir, 1974)

B. THE EVEN-HANDED APPLICATION OF WORK RULES HAS A DISPROPORTIONATE EFFECT ON SABBATARIANS WHICH REQUIRES A REASONABLE ACCOMMODATION TO CURE

A conclusion can readily be drawn from the cases which have arisen on the subject of religious accommodation. An extensive review of the case law has revealed almost no suits involving Sunday Sabbath worshippers. It can reasonably be inferred therefore that the problem of employment in conjunction with a Sabbath work restriction falls disproportionately on Saturday Sabbath workers, a condition which *Griggs* v *Duke Power Co,* 401 US 424 (1971), declares to be a violation of Title VII. In most instances, the employment practice which results in discrimination against Sabbatarians is the result of an even-handed application of work rules. It was just such an even-handed application of an unemployment compensation policy which was struck down by the Court in *Sherbert* v *Verner,* 374 US 398 (1963). That case involved a Saturday Sabbath Observer who was refused unemployment benefits because of his refusal to work on Saturdays. The Court found that this unconstitutionally abridged the Sabbatarian's right to free exercise of his religion.

If the above stated conclusion is true, i.e. that Sunday Sabbath worshippers basically encounter no problems in working and practicing their religion, the fact that Sabbatarians do, requires affirmative action. The remedy to the evil of religious discrimination in employment which Sabbatarians have sustained is a reasonable accommodation to those employees' religious needs.

C. THE PRINCIPLES OF STATUTORY CONSTRUCTION DICTATE THAT 42 USC §2000e(j) BE UPHELD

Petitioner, Trans World Airlines, Inc., has urged on this Court the conclusion that a reasonable accommodation of Respondent Hardison would cause labor problems and violate the Establishment Clause. Analysis of these assertions leads one to the conclusion that the true question confronting the Court is, in reality, one of statutory construction.

One of the principles of statutory construction is that a statute should not be construed in such a manner as to render it partly ineffective or inefficient or to cause public injury or inconvenience, if another construction will make it effective, *United States of American* v *Powers*, 307 US 214 (1938). An adverse decision of this Court as to the validity of either the EEOC's religious discrimination guidelines or 42 USC §2000e(j) (the provisions of which are explained in the next paragraph) would render Title VII's general prohibitions against religious discrimination ineffective and would substantially injure Saturday Sabbath observers, as will be seen.

The EEOC's religious discrimination guidelines were first enacted in 1967, 29 CFR §1605. Title VII was amended in 1972 to incorporate the guidelines into the Act, 42 USC §2000e(j). Under these provisions, employers and labor unions have had an affirmative obligation to accommodate an employee's or prospective employee's religious observances or practices for over ten years. As the federal Court of Appeals decisions have been substantially in accord as to the requirement of such accommodation, and because relatively few suits have arisen, it must be assumed that there has been basic compliance with the requirement.

A reversal of the Court of Appeals for the Eighth Circuit would for the most part leave Sabbatarians, under the provisions of Title VII, without the ability to practice their religion and remain gainfully employed. It would assuredly make the Title VII general prohibition on religious discrimination ineffective and would possibly cause grave injury to Michigan employees, and employees throughout the nation. The construction given the reasonable accommodation requirement by the majority of federal courts (i.e. that an employer must make substantial efforts to make an accommodation) would make the statute effective as the *Powers* case, *supra*, requires.

1. A UNIFORM SYSTEM OF JURISPRUDENCE AS BETWEEN THE STATE AND FEDERAL SYSTEMS IS REQUIRED

There is another compelling reason for upholding the reasonable accommodation requirement. 42 USC §§ 2000e-5(c) and (d) require deferral by the EEOC to the state agency in any state which has a state law prohibiting the unlawful employment practice alleged to have been committed. The state agency may then proceed to act upon the Complaint of discrimination. After a sixty day deferral period the EEOC may proceed with the Complaint also. In the twelve states which require reasonable accommodation there is a very real possibility that determinations under state and federal law would be in direct conflict should 42 USC §2000e(j) or the EEOC's religious discrimination guidelines be voided by this Court. The purpose of the deferral provisions was to relieve the burden to the EEOC of employment complaints. The concept of deferral would make little sense if the state and federal civil rights organizations are not in accord. Much of the effectiveness of state civil rights agencies no doubt derives from the fact that an employer who does not

cooperate with the state must ultimately face the EEOC. Title VII was drafted to allow the EEOC to cooperate with state agencies, 42 USC §2000e-8(b). It is therefore obvious that Congress envisioned a uniform system of jurisprudence as between state and federal civil rights law. A construction of 42 USC §2000e(j), *supra*, which is not in harmony with the interpretations of state agencies would do substantial damage to the deferral concept and cooperation between the respective agencies.

2. THE ESTABLISHMENT CLAUSE IS NOT VIOLATED BY AN ACCOMMODATION REQUIREMENT

There is another principle of statutory construction which is applicable herein. In *United States* v *Thirty-Seven Photographs*, 402 US 363, 369 (1971), the Court in quoting *Crowell* v *Benson*, 285 US 22, 62 (1932), stated that:

> ' . . . [w]hen the validity of an act of the Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided . . . . '

It is thus appropriate to consider the Establishment Clause question at this juncture. The amicus respectfully asserts that a reasonable accommodation requirement does not violate US Const, amend 1.

In *Zorach* v *Clauson*, 343 US 306 (1952) the Court held that:

> . . . Government may not finance religious groups nor undertake religious instruction nor blend secular and

> sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here. p 314

In the instant case, to do nothing is to favor the Sunday Sabbath of the majority Christians, and to accommodate Sabbatarians is to maintain government neutrality as to the Sabbaths of the various religions. Accommodation does not favor Sabbatarians' beliefs over the beliefs of others. It treats them equally. The failure to accommodate favors the believers in the Sunday Sabbath.

In *Zorach*, Mr. Justice Douglas explained the relationship between church and state under the First Amendment:

> . . . The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise, the state and religion would be aliens to each other — hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire

protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; so help me God in our courtroom oaths — these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

We would have to press the concept of separation of Church and State to these extremes to condemn the present law on constitutional grounds. The nullification of this law would have wide and profound effects. A Catholic student applies to his teacher for permission to leave the school during hours on a Holy Day of Obligation to attend a mass. A Jewish student asks his teacher for permission to be excused for Yom Kippur. A Protestant wants the afternoon off for a family baptismal ceremony. In each case the teacher requires parental consent in writing. In each case the teacher, in order to make sure the student is not a truant, goes further and requires a report from the priest, the rabbi, or the minister. The teacher in other words cooperates in a religious program to the extent of making it possible for her students to participate in it. Whether she does it occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students does not alter the character of the act. pp 312-313

The Court in *School District of Abingdon Twp, Pa* v *Schempp*, 374 US 203, 222 (1963) a school prayer and Bible

reading case, said as follows in determining whether legislation violates the Establishment Clause:

> . . . The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. [citations omitted]

In the instant case, it is submitted that the required secular legislative purpose and primary effect which neither advances nor inhibits religion is present and that is the removal of employment discrimination — in this case religious discrimination in employment. The Court, in *Schempp*, continued by opening that:

> . . . The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion . . . . pp 222-223

This is precisely what accommodation in the instant case accomplishes. The failure to accommodate restrains Hardison's free exercise of his religious beliefs. Accommodation enables him to exercise his religious beliefs as freely as the Sunday Sabbath worshipper.

Also to be considered is the problem of entanglement between the church and state. The only possible entanglements, when considering a question of reasonable accommodation are interactions between the employer and employee. *Lemon* v *Kurtzman*, 403 US 602 (1971) *reh den*, 404 US 876 (1971) is enlightening. It was there said:

> Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable . . . . p 614

The only possible entanglement between church and state in imposition of an accommodation requirement is that an analysis of an employee's religious needs by the appropriate civil rights organization or the courts may be required. Interactions of this type are truly not of the nature of those prohibited by the Constitution. The Supreme Court's decisions with respect to entanglement have involved such things as the tax exempt status of churches, *Walz* v *Tax Commission of the City of New York*, 397 US 604 (1970); state salary supplements for parochial school teachers, *Lemon* v *Kurtzman*, *supra;* a federal construction grant to a religious educational facility, *Tilton* v *Richardson*, 403 US 672 (1971); *reh den*, 404 US 874 (1971); state assistance to church-related schools in the performance of their secular functions, *Norwood* v *Harrison*, 413 US 455 (1973); and state reimbursement for costs of state mandated testing and recordkeeping, *Levitt* v *Committee for Public Education & Religious Liberty*, 413 US 472 (1973). These are simply not of the manner of entanglement which would occur herein.

The entanglement test suggested by *Lemon*, *supra*, is to the following effect:

> In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority . . . . p 615

The institutions benefited by enforcement of an accommodation requirement are the civil rights organizations which are enabled thereby to eliminate some of the religious discrimination in employment. In a very indirect manner the churches may benefit. Suppose, for instance, that an employee wishes to be excused from work to attend church. The accommodation of the employee's religious needs does not result in increased church attendance but rather leaves the option of attendance with the worshipper. This accomplishes the desired end of government neutrality toward religion. The aid provided by the state would be the elimination of employment discrimination. The resulting relationship between government and religion is so slight as to be negligible. It does not approach the entanglement forbidden by the Constitution.

III

REASONABLE ACCOMMODATION REQUIRES NO MORE THAN THE SAME ARRANGEMENTS MADE TO COMPENSATE FOR THE ABSENCE OF AN EMPLOYEE FOR ANY REASON

The manner in which the question of reasonable accommodation is most frequently conceived is that it requires a special favor or arrangement to an employee because of his or her religion. At first blush this may seem to be the true state of events. However, placed in its proper perspective, this question takes on a totally different character.

Petitioner, Trans World Airlines, Inc., has essentially pleaded throughout the instant cause that the problem of releasing an employee for religious reasons has special significance and requires a unique solution. First, the standard of reasonable accommodation is only required in the event that it can be accomplished without undue hardship on the conduct of the employer's business, 42 USC §2000e(j). This provision provides a valid defense to the employer should the accommodation amount to an undue hardship. It involves a simple question of proof. It is a legal determination based on the facts in existence.

What the amicus objects to, and the reason behind the employee's or prospective employee's grievance over an employer's accommodation efforts, is the arbitrariness of the decision not to accommodate. The case law indicates that employers, when faced with a religious accommodation question, quite often resort to a hard-nosed attitude. The proper perspective in which to view reasonable accommodation problems is that they are the same as any other absence from one's employment. It is true that the same employee is not off work once a week because of a reason such as sickness but the replacement of a Sabbatarian is no different than the replacement for any other reason and there simply are not that many Sabbatarians to be accommodated.

If an analogy is drawn between an absence for religious reasons and an absence for any other reason it will be seen that reasonable accommodation of employees is possible within the terms of any union contract. All collective bargaining agreements must provide for replacement of employees when there is an absence because of vacation, sickness, accident, long-term disability, personal leave or a no-show. The same way in which these absences are covered could be done to accommodate an employee's religious observance.

Employers, when confronted with such an argument most often respond that employees will want Tuesdays, Wednesdays and other days off for religious observance. The cases have shown that such a result has not materialized. If it does, the employer can plead and prove undue hardship.

CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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Dated: January 25, 1977

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1126

TRANS WORLD AIRLINES, INC.,
Petitioner,

—v.—

LARRY G. HARDISON, *et al.*,
Respondents,

—and—

No. 75-1385

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *et al.*,
Petitioners,

—v.—

LARRY G. HARDISON, and TRANS WORLD AIRLINES, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; BRIEF *AMICUS CURIAE*

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Civil Liberties Union respectfully moves, pursuant to Rule 42 of this Court's Rules, for leave to file the

within brief amicus curiae. Counsel for Mr. Hardison and counsel for the unions have consented to the filing of this brief; counsel for Trans World Airlines has neither consented nor objected.*

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members, dedicated solely to defending the safeguards of the Bill of Rights. In its 55-year history, the ACLU has been particularly concerned with and sensitive to the protection of religious conscience, as well as with the prohibition on the establishment of religion. In that connection, we participated as amicus curiae in this Court's landmark decision in Sherbert v. Verner, 374 U.S. 398 (1963). The issues raised here are similar to the ones considered there. In our view, the protection of religious conscience embodied in Title VII of the Civil Rights Act of 1964, as amended, is a valid and proper exercise of congressional power in the service of constitutionally valid objectives.

It is to present this analysis that amicus curiae respectfully moves for leave to file this brief.

---

* Copies of these various letters will be filed with the Clerk.

Respectfully submitted,

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IN THE
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BRIEF FOR THE AMERICAN CIVIL LIBERTIES
UNION, AMICUS CURIAE

Interest of Amicus

The interest of amicus appears from the foregoing motion.

Constitutional, Statutory and Regulatory Provisions Involved

The First Amendment to the Constitution provides in part:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof....

Article I, Section 8 of the Constitution provides in part:

> The Congress shall have the power...
> To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

Section 703(a) of the Civil Rights Act of 1964 (42 U.S.C. Section 2000c-2(a)) provides:

> It shall be an unlawful employment practice for an employer -

> (1) to...discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's... religion....

Acting under this provision, the EEOC, in 1967, adopted Guideline 1605.1 (29 C.F.R. Section 1605.1) which provides:

> [S]ection 703(a)(1) of the Civil Rights Act of 1964...includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business.
>
> ...[T]he employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

In 1972, Title VII of the 1964 Civil Rights Act was amended by adding the following language as Section 701(j) (42 U.S.C. Section 2000e(j):

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an

> employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

The Question to Which This Brief is Addressed

The brief in this case, involving the dismissal of an employee who for religious reasons refused to work on his Sabbath, is addressed to the single question: Was the enactment of Section 801(j) of the Civil Rights Act of 1964 within the "necessary and proper" clause of Article I, Section 8 of the Constitution as applied to the Free Exercise Clause of the First Amendment?

Summary of Argument

Although the constitutionality of the Civil Rights Act of 1964 has been upheld by this Court as a valid exercise of the "necessary and proper" provisions as applied to the Commerce Clause, it could equally have been upheld under that provision as applied to the Equal Protection Clause. By the same reasoning, insofar as the specific issue raised in this proceeding is concerned, it could have been upheld under the provision as applied to the Free Exercise Clause of the First Amendment. In enacting the 1972 amendment to the Civil Rights Act of 1964 in issue in this case, Congress could well have determined that it

was necessary and proper in order to assure the free exercise of religion that employers should not discriminate against employees whose religious commitments can be accommodated without undue hardship on the conduct of the employer's business.

ARGUMENT

THE VALIDITY OF SECTION 701(j) OF THE CIVIL RIGHTS ACT OF 1964 CAN BE SUSTAINED UNDER THE "NECESSARY AND PROPER" CLAUSE AS APPLIED TO THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

It is a universally recognized historic fact that the Civil Rights Act of 1964 was a product of the struggle for full equality by black people in the post-World War II period. It constituted a resumption of the struggle begun in the Reconstruction period by the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments and the enactment by Congress of seven civil rights laws during that period. But it was more than that, for if that is all that it was there would have been neither need nor purpose for including a prohibition against discrimination on ground of religion. In the hearings which preceded the enactment of the statute there was no testimony offered nor other evidence presented to indicate that America's blacks suffered discrimination because of their religion. On the contrary, blacks, while members of the nation's racial minorities, are at the same time members of its religious majority.

In defending the constitutionality of the Civil Rights Act of 1964 in its application against nongovernmental enterprises the Government, in Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), based its case primarily on the Commerce Clause because it feared that the Court might hold that the power of Congress to act under the Fourteenth Amendment was limited to governmental discrimination. It soon became manifest that the fear was unfounded; the Court was soon to hold that although Section 1 of the Fourteenth Amendment is judicially enforceable only against state action, Congress is not so limited under Section 5, which empowers Congress to enforce Section 1 by appropriate legislation. United States v. Guest, 383 U.S. 745 (1966); Griffin v. Breckenridge, 403 U.S. 88 (1971).

Neither the First Amendment nor any other of the first ten amendments has an express enforcement clause. It is difficult to believe that Congress has less power to insure meaningful enforcement of these amendments than it has in respect to the Thirteenth and all subsequent amendments that do have such a clause. The simple answer is that the "necessary and proper" provision of Article I, Section 8 of the Constitution serves exactly the same purpose as the "appropriate legislation" provision in the Thirteenth and later amendments; indeed, the word "appropriate" is simply the 19th century form of the 18th century word "proper."

We do not contend that the Free Exercise Clause, standing by itself, forbids dismissal by Trans World Airlines (hereinafter, TWA) of Hardison because he is a Sabbatarian whose conscience forbids him to work on Saturdays. We urge only that the "necessary and proper" provision applied to the Free Exercise Clause of the First Amendment empowered Congress to enact the 1972 amendment to the Civil Rights Act of 1964 here in issue.

The petitioners in the present cases do not challenge the constitutionality of the original provision in the 1964 Act forbidding employment discrimination because of religion (Section 703(a); 42 U.S.C. 2000e-2(a)). They challenge only the constitutionality of the 1972 amendment defining religion to include all aspects of religious observance or practice, accommodation whereto does not impose undue hardship upon the employer. That definition, we suggest, is far closer to the wording of the Free Exercise Clause than is the Act itself to the Commerce Clause.

To the argument in the Heart of Atlanta Motel case that in enacting the statute Congress was motivated by moral judgments rather than a desire to facilitate commercial intercourse, the Court replied:

> ...In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from

> the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong. Heart of Atlanta Motel v. United States, 379 U.S. at 252-253.

Certainly, moral judgments are at least as appropriate to the free exercise of religion as they are to the free flow of commerce.

The broad scope of Congressional powers under the "necessary and proper" clause was expressed in classic terms by Chief Justice Marshall in McColluch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819):

> ...Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

Nothing in the Constitution expressly authorized Congress to establish a bank of the United States, and certainly nothing

authorized it to establish branches and subbranches of such a bank. Nevertheless, the Court held that Congress could constitutionally conclude that it was necessary and proper for the execution of the expressed powers to lay and collect taxes, to pay debts and borrow money that such a bank with branches and subbranches be established. Certainly, at least as much can be said for the 1972 amendment to the Civil Rights Act in respect to the Free Exercise Clause.

The first ten amendments to our Constitution have often been called our expanding Bill of Rights. In most cases, the expansion has been effected by judicial decisions, some of them on their face far more distant from the original language than the religion provision of the Civil Rights Act of 1964. Thus the First Amendment's guaranty of freedom to speak has been held to encompass freedom to communicate feelings through symbols such as a red flag[1] or a black armband,[2] freedom to hear or read,[3] and indeed the direct opposite of freedom to speak, that is, freedom not to speak.[4] Its

1. Stromberg v. California, 283 U.S. 359 (1931).
2. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).
3. Stanley v. Georgia, 394 U.S. 557 (1969).
4. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

guaranty of freedom of assembly has been held to encompass freedom of association and to keep secret from the government the fact of such association.[5] Perhaps even more spectacularly, the opening word of the amendment, "Congress" - a word which one would assume to be ultimately precise in its meaning, especially since it is used in reference to making laws - has in effect been construed to mean also the President[6] and the judiciary.[7]

More apposite to the issue in the present case are decisions of the Court construing the Free Exercise Clause as forbidding compulsory jury service by one whose religious convictions preclude such service,[8] and barring enforcement of compulsory school attendance laws against parents and youths whose religious convictions forbid school attendance beyond the elementary school level.[9] Most pertinent to the present case, however, are the Court's decisions in Sherbert v. Verner, 374 U.S. 399 (1963) and Marsh v. Alabama, 326 U.S. 501 (1946).

5. National Association for the Advancement of Colored People v. Alabama, 357 U.S. 449 (1958).
6. Laird v. Anderson, 466 F.2d 283, certiorari denied 409 U.S. 1076 (1972).
7. New York Times Co. v. United States, 403 U.S. 713 (1971).
8. In re Jennison, 375 U.S. 14 (1963).
9. Wisconsin v. Yoder, 406 U.S. 205 (1972).

In Sherbert v. Verner the Court held violative of the Free Exercise Clause the denial of unemployment compensation to a worker who, like Hardison in the instant case, could not accept or retain employment requiring work on Saturday because it was contrary to her religious convictions.

In Marsh v. Alabama, the power of Congress to act affirmatively to protect freedom of religion was strongly suggested by the Court. It there held that, under the Free Exercise Clause, a company wholly owning a town could not bar colporteurs from distributing religious tracts on its streets. In reaching that result, it specifically suggested (although Justice Frankfurter expressed the view, at p. 511, that it was not necessary to do so) that the same result could have been reached by Congressional action under the Free Exercise Clause. It said (p. 507, n. 4):

> ...And certainly the corporation can no more deprive people of freedom of press and religion than it can discriminate against commerce. In his dissenting opinion in Jones v. Opelika, 316 U.S. 584, 600,...which later was adopted as the opinion of the Court, 319 U.S. 103, 194,... Mr. Chief Justice Stone made the following pertinent statement: "Freedom of press and religion, explicitly guaranteed by the Constitution, must at least be entitled to the same freedom from burdensome

> taxation which it has been thought that the more general phraseology of the commerce clause has extended to interstate commerce. Whatever doubts may be entertained as to this Court's function to relieve, unaided by Congressional legislation, from burdensome taxation under the commerce clause,...it cannot be thought that that function is wanting under the explicit gurananties of freedom of speech, press and religion." (Emphasis added)

The power of Congress to protect interstate commerce from interference, by burdensome taxation or otherwise, extends to interference by private enterprises like petitioner TWA as well as to interference by states. In the present case, Congress has enacted legislation of the kind suggested in Marsh. What we here suggest is that its enactment can be viewed as an exercise of the Congressional powers under both the Commerce and Free Exercise Clauses, since the "necessary and proper" clause applies equally to both.

Property and contract rights, the Court held in Marsh, are important in our democratic system, but civil liberties are even more important:

> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we

> must here, we remain mindful of the fact that the latter occupy a preferred position... In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties... (326 U.S. at 509).

We deem Marsh v. Alabama particularly apposite because as a political-social-economic reality the modern multi-state and multi-national corporation such as TWA is the latter twentieth century equivalent of the company town of the nineteenth and early twentieth centuries. The Bill of Rights speaks to governmental entities, national, state and local, but when a world-wide corporation such as TWA plays as large or larger a role in affecting the lives and livelihoods of individuals as do small towns, village officials and local public school boards, it is, we believe, within the power of Congress under the "necessary and proper" clause to make applicable to them some of the constraints of the First Amendment.

Particularly relevant, too, are the Sunday Law Cases, specifically Gallagher v. Crown Kosher Market, 366 U.S. 617 (1961), and Braunfeld v. Brown, 366 U.S. 599 (1961).

There, in upholding the constitutionality of compulsory Sunday closing laws even when enforced against persons who, like the respondent herein, observe Saturday or some other day of the week but Sunday as their holy day of rest, Chief Justice Warren went out of his way to observe that a "number of States provide such an exemption [for Sabbatarians], and this may well be the wiser solution of the problem."[10] In the present case this is exactly what Congress has done: it has provided an exemption for Sabbatarians as the wiser solution to the problem.

Acting upon this advice of Chief Justice Warren all three of the states involved in those cases, Massachusetts, Pennsylvania, and Maryland, as well as New York whose compulsory Sunday closing law had previously been upheld when enforced against a Sabbatarian,[11] amended their laws so as to provide exemptions for persons who observed a day other than Sunday as their holy day of rest. The constitutionality of such an exemption was challenged in Arlan's Department Store v. Kentucky[12] on precisely the same grounds

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10. 366 U.S. at 608

11. Friedman v. New York, 341 U.S. 75 (1951), dismissing appeal in 302 N.Y. 75.

12. 371 U.S. 218 (1962), dismissing for want of a substantial federal question, 357 S.W.2d 708.

upon which the petitioners rely in the present case, namely that its purpose and effect were to aid religion. This Court, however, summarily rejected an application to review a decision upholding constitutionality.

The relevance and cogency of these decisions are not impaired by the fact that the protagonists in these cases were individuals asserting claims to the free exercise of religion, and governmental bodies, federal, state and municipal, the antagonists. In the first place, in Marsh v. Alabama, supra, the real party in interest and hence real antagonist was not the State of Alabama but the Gulf Shipbuilding Corporation which owned the town known as Chickasaw. In the second place, and more important, the preservation and protection of the liberties of Americans is not the exclusive domain of the judiciary; the legislative and executive departments too have a significant role to play, for their members too are required by Article VI to support the Constitution, including the First Amendment and its guaranty of the free exercise of religion. Fifteen years before the Amendment was added to the Constitution Thomas Paine said in Common Sense:

> As to religion, I hold it to be the indispensable duty of government to protect all conscientious professors thereof, and I know of no other business which the government hath to do

> therewith.[13]

There is no reason to believe that in making this statement Paine had in mind only the judicial branch and intended to exclude the legislative and executive departments from the duty to protect conscientious professors of religion, such as the respondent Hardison in the present case.

Enactment of the statute challenged herein is not the first instance in which Congress intervened to protect religious liberty beyond the limits constitutionally imposed upon it. At least since the Selective Draft Law Cases during World War I,[14] it has been the established law that the Free Exercise Clause does not preclude imposition of compulsory military service upon those who for religious convictions will not participate in armed conflict.[15] The reason for these decisions

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13. M.D. Conway, ed., Writings of Thomas Paine, Vol. 1, pp. 108-109. (Emphasis added)

14. Arver v. United States, 245 U.S. 366 (1918)

15. Hamilton v. Regents of the University of California, 293 U.S. 245 (1934); In re Summers, 325 U.S. 561 (1945).

is that the courts must accept the judgment of Congress in balancing the competing claims of the nation's ability to defend itself and the demands of religious conscience. Nevertheless, when Congress determines that according exemption to conscientious objectors would not impair the nation's ability to defend itself and accordingly grants exemption to religious objectors, that decision, this Court has held, would not violate the Establishment Clause but would on the contrary be consistent with the spirit if not the command of the Free Exercise Clause. Gillette v. United States, 401 U.S. 437 (1971). We add only that the hardships suffered by other draftees called upon to serve because of the exemption accorded by Congress exceed by far those suffered by the petitioners herein.

The petitioners in this case place their exclusive reliance on the Establishment Clause of the First Amendment. There may be instances in which there is, or appears to be, a clash between different values protected in the Bill of Rights, for example, cases in which the judge in a criminal proceeding feels that a fair trial in the particular circumstances of the case is impossible unless the press is barred, thus presenting a conflict between the freedom of the press guaranty of the First Amendment and the Sixth Amendment's

guaranty of a fair trial.[16] Closer to the present case are instances in which it is claimed that strict enforcement of the Establishment Clause would impinge upon the rights secured by the Free Exercise Clause. We believe that in most if not all cases these conflicts are more apparent than real. Neither Paine, who would impose a duty upon government affirmatively to protect religious liberty but at the same time to have no further business with religion, nor James Madison, the author of the First Amendment, which forbids government equally to establish religion or to prohibit its free exercise, saw any conflict between them. In any event we do not believe any such clash or conflict is presented in the instant case. Other briefs, submitted by the respondent and other amici curiae, adequately meet the claim that the statute challenged in this case violates the Establishment Clause. We endorse the position they take and accept the arguments they present. For ourselves we urge that in upholding the constitutionality of Section 701(j) of the Civil Rights Act of 1964 the Court will give meaningful effect to the Free Exercise Clause without in any way impairing the integrity of the Establishment Clause.

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16. See. e.g., Estes v. Texas, 381 U.S. 532 (1965); Sheppard v. Maxwell, 384 U.S. 333 (1966); Nebraska Press Association v. Stuart, ___ U.S. ___ (1976).

Conclusion

For the reasons set forth herein, as well as the reasons set forth in the briefs of the respondent and other *amici curiae* supporting his position, it is respectfully submitted that the judgment of the Court of Appeals upholding the constitutionality of the statute challenged herein should be affirmed.

Respectfully submitted,

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February, 1977

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IN THE

Supreme Court of the United States

October Term, 1976

No. 75-1126

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

LARRY G. HARDISON, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 142, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 1650,
and *Respondents.*

No. 75-1385

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 142, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 1650,
Petitioners,

v.

LARRY G. HARDISON and TRANS WORLD AIRLINES, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF CENTRAL CONFERENCE OF AMERICAN RABBIS, RABBINICAL ASSEMBLY, RABBINICAL COUNCIL OF AMERICA, UNION OF AMERICAN HEBREW CONGREGATIONS, UNITED SYNAGOGUE OF AMERICA, AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, JEWISH LABOR COMMITTEE, JEWISH WAR VETERANS OF THE UNITED STATES OF AMERICA AND NATIONAL COUNCIL OF JEWISH WOMEN, *AMICI CURIAE*

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The undersigned, as counsel for American Jewish Committee, American Jewish Congress, Anti-Defamation League of B'nai B'rith, Central Conference of American

Rabbis, Jewish Labor Committee, Jewish War Veterans of the United States of America, National Council of Jewish Women, Rabbinical Assembly, Rabbinical Council of America, Union of American Hebrew Congregations and United Synagogue of America, respectfully moves this Court for leave to file the accompanying brief *amici curiae* in support of respondent Larry G. Hardison's claim that the statute and regulation herein challenged, which protect employees against discrimination because of their religious practices, do not violate the First Amendment to the United States Constitution.

Consent to the filing of the attached brief was sought from the parties.* Counsel for respondent Hardison and petitioner-respondent International Association of Machinists consented. Counsel for petitioner-respondent Trans World Airlines, Inc. replied that they neither consented nor opposed the motion.

The interest of the *amici* is set forth in the attached brief. All of the *amici* are national Jewish agencies having a substantial interest in civil rights generally and in the protection of the right of every American to observe and practice the requirements of his religion. Each is able to address the constitutional issue raised on this appeal in the broad context of this country's tradition of religious freedom and each respectively offers this Court its accumulated experience on the issue raised by this case.

* The letters requesting consent were sent in behalf of the Synagogue Council of America and the National Jewish Community Relations Advisory Council. This motion and brief are being filed by 11 organizations which are affiliates of those two organizations. In view of the fact that consent was withheld by one of the parties in response to the initial request, thereby necessitating the making of this motion, counsel did not deem it necessary to resubmit the request for consent on behalf of the 11 affiliates.

The *amici* request permission to submit the accompanying brief because they believe that this case presents a serious challenge to measures taken by the Federal Government to prevent a recognized evil—economic pressure on individuals to violate religious commands which their consciences require them to obey. The *amici* believe that their experience enables them to make a contribution to the consideration by this Court of this important challenge.

Respectfully submitted,

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Interest of the *Amici*

This brief is submitted on behalf of:

Central Conference of American Rabbis, representing the Reform rabbinate;

Rabbinical Assembly, representing the Conservative rabbinate;

Rabbinical Council of America, representing the Orthodox rabbinate;

Union of American Hebrew Congregations, representing the Reform congregations; and

United Synagogue of America, representing the Conservative congregations;

and on behalf of the following national Jewish organizations:

American Jewish Committee

American Jewish Congress

Anti-Defamation League of B'nai B'rith

Jewish Labor Committee

Jewish War Veterans of the United States of America

National Council of Jewish Women

Our interest in the cases before this Court is two-fold. In the first place, respondent Hardison, like members of the Jewish faith, observes the seventh day of the week as his Sabbath and refrains from all secular business and labor on that day. Without the protection accorded by the Congressional enactment and regulation challenged in this case, the conscientiously observant employee would be forced to violate a major tenet of his faith in order to secure gainful employment.

However, our concern extends beyond the interests of the particular parties to this litigation. We would be just as concerned even if respondent Hardison were not an observer of the seventh day of the week as the Sabbath. We would be and are concerned because we are committed to the principle of the free exercise of religion and the right of all persons to the full protection of that principle.

For these reasons, these organizations joined in a brief *amici curiae* filed, with the consent of the parties, in this Court in the case of *Parker Seal Company* v. *Cummins*, —— U.S. ——, 97 S. Ct. 342 (1976), which raised the same issues as those raised in this case, and submit to the Court this brief in the present case.

Constitutional and Statutory Provisions and Regulations Involved

The First Amendment to the Constitution provides, in part:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . .

Section 703(a) of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e-2(a)) provides:

> It shall be an unlawful employment practice for an employer—(1) to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . .

Acting under this provision, the EEOC, in 1967, adopted Guideline 1605.1 (29 C.F.R. Section 1605.1), which provides:

> [S]ection 703(a)(1) of the Civil Rights Act of 1964 . . . includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business.
>
> [T]he employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

In 1972, Title VII of the 1964 Civil Rights Act was amended by adding the following language as Section 701(j) (42 U.S.C. Section 2000e(j)):

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

The Question to Which This Brief Is Addressed

This brief is addressed to the single question of the constitutionality, under the First Amendment, of Section 701(j) of the Civil Rights Act of 1964 (and the regulation that preceded it), which defines "religion," as used in the section of that Act forbidding discrimination in employment because of religion, to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accom-

modate to an employee's religious observance or practice without undue hardship on the conduct of the employer's business."

The question encompasses constitutionality in respect not only to the employer, but also to labor unions claiming that the statutorily prescribed accommodation violates collective bargaining agreements.

Statement of the Case

This proceeding was initiated by respondent Hardison, a member of a seventh-day sect, the Worldwide Church of God, after he was discharged by petitioner Trans World Airlines, Inc. (hereinafter TWA) because he refused to work on Saturdays. After the discharge, Hardison filed an unlawful employment practice charge with the United States Equal Employment Opportunity Commission, which deferred to the Missouri Commission on Human Rights. On February 10, 1972, when all administrative procedures had been exhausted, Hardison filed this suit against TWA and the three unions (hereinafter IAM) who are petitioners herein in the United States District Court pursuant to 42 U.S.C. Section 2000e-2. He contended that all the defendants had practiced religious discrimination and, in addition, that the unions had violated their duty of fair representation. Following a trial, primarily on stipulated facts, judgment was entered for all defendants on the ground that each had attempted a reasonable accommodation of plaintiff's religious needs, as required by the controlling statutes and guidelines, and that undue hardships would have resulted from any greater efforts.

The Court of Appeals for the Eighth Circuit, without dissent, reversed as to TWA but affirmed as to the defendant unions. In respect to TWA, it held that it had engaged in religious discrimination by breach of its duty to make a reasonable accommodation to the religious needs of Hardison through feasible affirmative action and accordingly remanded the cause to the District Court for a determination of appropriate relief.

In respect to the defendant unions, it affirmed the judgment of dismissal, holding that, while in a proper case a union may be held to a duty of reasonable accommodation, Hardison had not directly challenged the District Court's finding that the duty to accommodate in this case did not require unions to ignore their seniority system and that the efforts of the unions in behalf of Hardison did not violate their duty of fair representation. It reserved for future cases the effect of a union's refusal to modify its employee seniority rights when no other accommodation can be accomplished without undue hardship to the employer's business. Notwithstanding this decision in their favor, the unions have petitioned for (and been granted) certiorari on the authority of *Consolidated Edison Co.* v. *Labor Board,* 305 U.S. 197, 232-234 (1938).

Both the District Court and the Court of Appeals rejected the claim presented by the petitioners herein that the statute and the regulation on which it was based violated the Establishment Clause of the First Amendment.

Summary of Argument

I. The challenged statute and guideline do not violate the Establishment Clause of the First Amendment since they have a clearly recognizable secular purpose, their primary effect is neither to advance nor inhibit religion, and neither the statute and guideline nor their administration involve excessive government entanglement with religion. By statute and practice, the Federal Government and many state and municipal governments have long done and now do exactly what the challenged measures mandate and it is inconceivable that during this period they all have been violating the Establishment Clause.

The same factors which require a determination in favor of the constitutionality of the challenged statute and guidelines in respect to the employer are equally applicable in respect to the labor unions. The requirement, imposed by both the Executive and Legislative branches of our government, to make reasonable accommodations to the religious needs of employees, would be of no more than illusory value if it could be nullified by the veto of labor unions.

II. Not only do the challenged statute and guideline not violate the Establishment Clause but their validity can be sustained under the "necessary and proper" clause of Article I, Section 18, of the Constitution, as applied to the Free Exercise Clause of the First Amendment.

ARGUMENT

POINT ONE

The challenged statute and guideline do not violate the Establishment Clause.

In *Meek* v. *Pittenger,* 421 U.S. 349, 358 (1975), this Court expressed the three-part test for validity of a statute challenged under the Establishment Clause. "First," it said, "the statute must have a secular legislative purpose. Second, it must have a primary effect that neither advances nor inhibits religion. Third, the statute and its administration must avoid excessive governmental entanglement with religion." Petitioners claim that the statute and regulation challenged herein fail under each of these tests. We believe there is no validity to this claim in respect to any part of the three-pronged test.

A. The statute and guideline have a substantial secular purpose.

In respect to the first of these prongs, we note that this Court has never found any statute enacted by Congress to be lacking a substantial secular purpose and only twice has it made such a finding in a challenge to a state statute. The claim of illegitimacy of purpose has been made often but, with the two exceptions, it has consistently been rejected. *McGowan* v. *Maryland,* 366 U.S. 420, 449 (1961) (Sunday closing law); *Tilton* v. *Richardson,* 403 U.S. 672, 678-79 (1971) (inclusion of church-related colleges under the Higher Education Facilities Act of 1963); *Board of Education* v. *Allen,* 392 U.S. 236, 243 (1968) (aid to parochial

schools); *Lemon* v. *Kurtzman,* 403 U.S. 602, 612-13 (1971) (same); *Committee for Public Education and Religious Liberty* v. *Nyquist,* 413 U.S. 756, 773-74 (1973) (same); *Lemon* v. *Sloan,* 413 U.S. 825, 829-30 (same); *Hunt* v. *McNair,* 413 U.S. 734, 741-42 (1973) (aid to church-related colleges); *Walz* v. *Tax Commission of the City of New York,* 397 U.S. 664, 672-73 (1970) (tax exemption for houses of worship).

The two exceptions are *Abington School District* v. *Schempp,* 374 U.S. 203 (1963) (law requiring Bible reading in public schools), and *Epperson* v. *Arkansas,* 393 U.S. 97 (1968) (law banning teaching of evolution in public schools). Both of these cases involved affirmative religious intrusions into the public schools. Neither involved excusing children from school attendance on their Sabbath or holy days. That the Court has not questioned the constitutionality of such excusals is strongly suggested by *Zorach* v. *Clauson,* 343 U.S. 306, 313 (1952), which is far more apposite to the present case than *Abington* and *Epperson.*

With all due respect, the claim that the challenged statute lacks a secular legislative purpose borders on the frivolous. The logic of the claim is that any statute or constitutional provision seeking to protect the free exercise of religion, logically including the Free Exercise Clause of the First Amendment itself, lacks a secular purpose.

The only evidence submitted by petitioners in either case to support this claim are remarks made by Senator Randolph in 1972 in sponsoring the amendment to the 1964 Act that became Section 701(j) (TWA Brief, pp. 37-39;

IAM Brief, pp. 43-46). The remarks quoted in these briefs, in the total context of the legislative history, hardly support the claim. Indeed, they reflect a profound concern for protecting the religious liberty of those observing a day other than Sunday as their holy day of rest.

But there is a more serious flaw in petitioners' argument. As petitioners recognize in their briefs, respondent's claim arose before the 1972 amendment was adopted and accordingly was governed by the law at the time he was discharged. The 1972 amendment is practically a verbatim incorporation of the relevant 1967 guideline. Accordingly, petitioners argue, as indeed they must, that the 1967 guideline upon which respondent's claim was initially based was itself lacking a secular purpose. The Federal District Courts and Courts of Appeal passing upon claims under the guideline identical with that of the respondent herein had no difficulty regarding its constitutionality. *Jackson* v. *Veri Fresh Poultry, Inc.*, 304 F. Supp. 1276 (E.D. La. 1969); *Riley* v. *Bendix Corp.*, 464 F. 2d 1113 (5th Cir. 1972); *Reid* v. *Memphis Publishing Co.*, 468 F. 2d 346 (6th Cir. 1972), *aff'd after remand*, 521 F. 2d 512 (1975); *Cummins* v. *Parker Seal Company*, 516 F. 2d 544, *aff'd* —— U.S. ——, 97 S. Ct. 342 (1976); *Claybaugh* v. *Pacific Northwest Bell Telephone Co.*, 365 F. Supp. 1 (1973); *Shaffield* v. *Northrop Worldwide Aircraft Services, Inc.*, 373 F. Supp. 1284 (1974).

The purpose of the 1972 amendment is quite obvious—and plainly secular. It was not to change existing law but to codify it. Its specific purpose was to remove the doubts as to EEOC's statutory authority to issue the very guide-

line upon which respondent herein based his claim in the first instance. See 118 Cong. Rec. H. 1861-62.

An analogous situation was the enactment by Congress in 1952 of a provision in the Immigration and Nationality Act codifying the decision of this Court in *Girouard* v. *United States*, 328 U.S. 61 (1946), which had held that the existing law did not bar naturalization of religious pacifists. The only difference between the two situations is that, in the present case, Congress sought to codify a number of consistent District Court and Court of Appeals decisions rather than a single decision of this Court. We suggest that this difference hardly supports a claim that the purpose of the 1972 amendment was purely sectarian.

In support of their position, petitioners in both cases rely particularly on the cases upholding the constitutionality of compulsory Sunday closing laws even when enforced against persons whose religious convictions forbid them to keep their stores open on Saturday (TWA Brief, p. 27; IAM Brief, pp. 49, 65, 75, 78). However, in the plurality opinion in *Braunfeld* v *Brown*, 366 U.S. 599 (1961), upon which petitioners in both cases place most reliance, Chief Justice Warren noted that a number of states provide by statute for an exemption for Sabbatarians "and this may well be the wisest solution to the problem" (at p. 608). Here, Congress has done exactly that. Petitioners' claim that it may not constitutionally do so is plainly inconsistent with Chief Justice Warren's opinion. In this respect, it is pertinent also to note that efforts to challenge the constitutionality of such exemption statutes on the same ground as that asserted by the petitioners in the present case, that is that they constitute perferential treatment of Sabba-

tarians in violation of the Establishment Clause, have consistently been rejected. See, *e.g., Arlan's Department Store* v. *Kentucky,* 371 U.S. 218 (1962).

B. The primary effect of the 1972 amendment and the 1967 guideline is not to advance religion but to protect the equal employment opportunity of those who observe a day other than Sunday as their holy day of rest.

The immediate obvious effect of the challenged statute and guideline, we submit, is not to advance religion but to relieve to some extent (*i.e.,* where the relief would be reasonable and would not impose undue hardship on the employer) the economic burden borne by a minority of Americans by reason of their faithful adherence to religions which do not conform to the majority's belief as to which day of the week God commanded abstention from labor. (As we seek to show below, the relief actually extends to a much broader class.) Of course, of those relieved by the statute and guideline from being required to go to work on Saturdays, some may attend church or synagogue on that day where otherwise they would be at work. But this, we suggest, is a slim reed to support a contention that this Court should nullify an act of the Congress, particularly one which does no more than codify existing practices of the Executive Department.

In *Zorach* v. *Clauson,* 343 U.S. 306 (1952), this Court upheld the constitutionality under the Establishment Clause of a law permitting the release of public school pupils if and only if they used the released period to participate in religious instruction. That law advanced religion

far more than one that simply excused children from attending public schools on their days of religious observance, which would be the equivalent of the law and guideline challenged in the present suit. Nevertheless, the Court upheld the constitutionality of that law on the ground that its primary purpose and effect were not to advance religion but to accommodate the school attendance law to the religious needs of the children and their parents.

(Parenthetically, we note that the concern of TWA that affirmance herein "could encourage members to take advantage of the accommodation requirement to help assure larger church attendance and correspondingly fuller collection plates" (TWA Brief, p. 41, fn. 24), is hardly relevant in respect to the many Orthodox and Conservative Jews for whom we speak, since the same Mosaic law which forbids them to work on Saturdays also forbids them to carry or handle money on that day.)

The crux of the petitioners' complaint in both cases is that "the accommodation requirement, as construed by the court of appeals, gave Hardison special preference *solely* because of his religion." (TWA Brief, p. 40. Emphasis in original.) In respect to this claim, some comments are in order. In the first place, the statutory coverage is not limited to those who observe the Sabbath on Saturday. The statute does not mention Saturday. It applies equally to Moslems, whose Sabbath is Friday and to those sects or even individuals who may genuinely believe that Monday or Tuesday or any other day of the week is the divinely commanded day of rest. Indeed, and perhaps more important, it applies to Sunday-observing Christmas employed by a

Sabbatarian in a state which does not have a Sunday closing law, or in any of the many industries and other enterprises that are permitted to operate seven days a week.[1]

In the second place, because most states do have Sunday closing laws or do close on Sundays because of collective bargaining factors, the owner's personal religious predilections, or similar reasons, the primary effect of the statute is not to advance the religion of Saturday-observers but is rather to equalize or, more accurately, to diminish to some extent the inequality between adherents of the majority religion and those of minority faiths.

Finally, the statute is not limited to abstention from work on Saturdays. It applies equally, for example, to Catholic and many non-Catholic physicians, nurses and other hospital employees who for religious reasons refuse to participate in an abortion procedure, to the pharmacy sales clerk who for religious reasons will not sell contraceptives, to hospital employees who as members of the Jehovah's Witnesses sect refuse for religious reasons to participate in a blood transfusion procedure or who, if school employees, refuse to salute the flag or pledge allegiance to it, to the Quaker civil service employee in a state which imposes an oath of office but does not permit an affirmation in lieu thereof, and most aptly to the conventional Sunday-observing Christian who happens to be employed by a Sabbatarian or by an employer who, like the petitioner in the present case, keeps his business open seven

1. The *New York Times,* on page D 5 of its issue of January 28, 1977, reports that a department store employee filed charges of unlawful discrimination by reason of his dismissal for refusing to work on Sunday in violation of his religious beliefs.

days a week. Without expressing an opinion one way or the other on whether these persons should be protected from dismissal (*cf.* 42 U.S.C. Section 300a-7, which gives certain protections to persons having religious scruples concerning sterilization and abortion), we submit that their obvious inclusion in the challenged statute and guideline negates the contention that the purpose and/or primary effect of the statute and guideline is to advance the religion of those who, like respondent herein, observe a day other than Sunday as their divinely ordained day of rest.

In all these instances and others that could be cited, the statute and guideline benefit not a narrow class but a class which in one instance or another may encompass a majority of Americans. However, even if the purpose of the challenged statute were to benefit a narrow class, that would hardly require its invalidation. The very purpose of the Establishment Clause, and of the Free Exercise Clause as we will shortly indicate, is to benefit narrow classes. No First Amendment is needed to protect members of large, conventional religions.

Finally, we submit that petitioners are in error in relying on this Court's decisions forbidding governmental financial aid to religious schools. Those decisions forbid the state to pay for educational services which it may itself not constitutionally furnish. The statute challenged here makes no such demand. It does not compel the employer to pay for services which, by reason of his religious convictions, the employee may not furnish or which, because of the First Amendment, the employer may not accept. If a Sabbatarian performs only four days' service weekly,

the statute does not compel the employer to pay him for five. (Indeed, in the present case, Hardison did offer an appropriate reduction in pay for his Sabbath absence but it was TWA which rejected the offer.) And, if the employee's absence from work on his Sabbath causes undue hardship on the conduct of the employer's business, the employer may lawfully discharge him. The religious school aid decisions forbid government to finance the operation of religious educational institutions. No religious institution, educational or otherwise, is financed directly or indirectly by the operation of the statute and guideline challenged herein.

Note should also be taken of the assertion in the IAM brief (at p. 50) that five of the "evils" against which the Establishment Clause was fashioned are furthered by the decision of the Court of Appeals in the present case. These are: "(1) discriminatory preference of religious over secular reasons for absence from work; (2) facilitation of religious activity for its own sake, by removal of non-discriminatory work-barriers; (3) taxation to support religious activity by imposing forfeiture of rights, expense and hardship upon others; (4) entanglement of employers, unions, a government agency and the courts in determination of religious questions; and (5) division of the work force politically along religious lines."

In respect to the first of these assertions, we need only refer to *Zorach* v. *Clauson,* 342 U.S. 306 (1952), in which the Court upheld the constitutionality of a law providing for the release of public school pupils from part of their regular school time to participate in religious, and only in

religious not secular, instruction off public school premises, and to *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), in which the Court held that students had a constitutional right to abstain from compulsory secondary schooling for religious and only religious reasons.

In respect to (2), we need only note that if facilitation of religious activity is either the purpose or effect of the statute and regulation challenged herein, it is only indirectly and minimally so. Nothing in them requires Hardison to go to church on Saturday; he can sit home and watch television all day if his religious commitment permits him to do so. Moreover, there is far more in the statute and regulation than abstention from work on Saturdays; nonparticipation in an abortion or blood transfusion procedure, for example, in no way facilitates religious activity.

In respect to (3), far more substantial "forfeiture of rights, expense and hardship" is imposed, for example, upon non-religious objectors to military service by reason of the exemption, upheld in *United States* v. *Seeger,* 380 U.S. 163 (1965), accorded to religious objectors; or upon real property owners who must make up in their taxes for the exemption accorded church properties, an exemption held not violative of the Establishment Clause in *Walz* v. *Tax Commission,* 397 U.S. 664 (1970). In any event, the statute and regulation in issue here specifically provide that the accommodation must be made only if it can be done without "undue hardship to the conduct of the employer's business."

In respect to (4), we see no entanglement by employers, unions or government agencies in any religious questions. The only question to be decided by anybody, including a court of law, is not the theological or doctrinal validity of the claim but the *bona fides* of the claimant. The constitutional competency of our courts to make such a determination is hardly open to question. *United States* v. *Seeger,* 380 U.S. 163 (1965); *United States* v. *Ballard,* 322 U.S. 78 (1944).

Finally, in respect to (5), it should be noted again that the challenged statute and regulation do not protect only a small sect of seventh-day observers but in one way or another may very well protect the majority of Americans, including those who for reasons of religious conscience will not work on Sundays; will not participate in birth prevention procedures or blood transfusions, or engage in a variety of other employment activities contrary to their sacred beliefs.

C. The Statute and Guideline do not patently require pervasive and excessive government entanglement with religion.

Whenever a governmental body is required to pass on a religion-based claim, some entanglement with religion is unavoidable. Were that entanglement fatal, no law exempting religious institutions from taxation would be constitutional. All religious incorporation laws would be invalid. Laws forbidding the sale of alcoholic beverages within specific distances of houses of worship would be unconstitutional, for in each case the governmental body mandated to enforce the law would be forbidden to determine whether

the claimant for protection was truly a house of worship. Laws exempting Christian Scientist and other practitioners of faith healing from laws regulating medical practice could not stand. Public school children could not be released for religious instruction since the school authorities could not determine whether the instruction was truly religious. Military chaplaincies could be outlawed, for the military authorities would be barred from passing judgment on whether the applicant was truly a chaplain and, if so, whether he was a competent one. Ministers could not be exempt from military or jury service. "Church Entrance —No Parking" signs would have to be removed. And innumerable other instances of legal determinations of claims based upon religion would have to be discontinued.

It is for this reason that the third prong of the test upon which petitioners rely mandates only *excessive* government entanglement with religion. A statute which seeks to forbid discrimination in employment because of religion necessarily imposes upon governmental agencies, whether judicial or administrative, the obligation to determine whether a claim asserted thereunder is made in good faith, and a review of the claim for that purpose can hardly be held to entail forbidden excessive entanglement.

On page 42 of its brief, TWA contends that the statute and regulation mandate unconstitutional excessive governmental entanglement with religion because "those enforcing the requirement will necessarily weigh and determine whether an individual has a religious belief, whether it is sincerely held and how that belief is manifested in the employment relationship."

Acceptance of this contention, we submit, would make an absurdity of the Free Exercise Clause, for it would mandate acceptance of any claim, no matter how frivolous, or rejection of all claims, no matter how sincere, made thereunder. More than three decades ago, it was held by this Court in *United States* v. *Ballard,* 322 U.S. 78 (1944), that it is constitutional to allow a jury, in a prosecution for obtaining property under false pretenses relating to religion, to decide whether the defendants believed in the truth of the representations they made. In many thousands of cases, Selective Service boards have been required under Section 6(j) of the Universal Military Training and Service Act, 50 U.S.C. App. 456(j), to pass on the sincerity of claims to a "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation." In *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), this Court upheld the right of parents under the Free Exercise Clause to withhold their children from attendance at secondary schools if they sincerely believed that their religious conscience would be violated by allowing them to attend. In *Cruz* v. *Beto,* 406 U.S. 939 (1972), this Court held that the Free Exercise Clause protected a prisoner's right to participate in religious services. See also *United States* v. *Kahane,* 396 F. Supp. 687 (E.D.N.Y. 1975), *aff'd,* 527 F. 2d 492 (prisoner's right to nutritionally adequate food which is compatible with religious dietary restrictions).

In all of these situations, and many others, acceptance of the constitutional claim depends on a judgment as to the sincerity of the asserted religious belief.

D. Consistent governmental practice, federal, state and municipal, supports the constitutionality of the challenged statute.

In *Walz* v. *Tax Commission,* 397 U.S. 664 (1970), this Court held that the practical universality of tax exemption for religious institutions is strong evidence of its constitutionality. While the practice of arranging the working schedule of governmental employees who are Sabbatarians so as not to compel them to violate their religious obligations may not be quite as universal as tax exemption for churches, it is sufficiently widespread to present strong evidence of its constitutionality. See, *e.g.,* Conn. Gen. Stat. §5-250(c); Fla. Stat. Ann. §231.40(1)(c); N.J. Rev. Stat. 11:14-8; N.Y. Civ. Serv. Rules and Regs. §21.6. Generally, only where the employee's seven-day availability for service is critically important to the performance of his duties—the functional equivalent of "undue hardship on the conduct of the employer's business" in the statute challenged herein—is a Sabbatarian compelled to choose between the loss of his position or the violation of his religious obligation.

Government, under our system, must act in accordance with law, and the Constitution is the supreme law of the land. If it is a violation of the Establishment Clause for the government to require other employers to make reasonable accommodations so as not to compel their employees to violate their religious obligations by working on their holy day of rest, it is no less a violation if the government, as employer itself, makes such accommodations.

It is no answer that the accommodation made by the government does not injure anyone whereas, if it is made

by a private employer, he and/or the Sabbatarian's fellow employees may be injured by it. Under the statutory provision challenged herein, the Sabbatarian employee is not entitled to relief if accommodation would be unreasonable or would cause undue hardship on the conduct of the employer's business. Conversely, it can hardly be urged that the exemption from military service enjoyed by clergymen and religious objectors to military service does not injure far more seriously those draftees who otherwise would not have been called to service.

Nor is it a sufficient answer that the government acts voluntarily whereas the private employer acts under compulsion of statutory law. In the first place, it is doubtful that, in our political system, any action of government can be said to be truly voluntary and not under compulsion of law. Secondly, whatever the case may be under the Free Exercise Clause, the voluntariness of the challenged action is irrelevant in judging whether it is violative of the Establishment Clause. (See *Engel* v. *Vitale,* 370 U.S. 421, 423, 430 [1962], where it was held that neither the fact that introduction of prayer recitation in public schools was voluntary on the part of a school board nor the fact that participation by the pupils was likewise voluntary immunized the practice from successful challenge under the Establishment Clause. To the same effect, see *McCollum* v. *Board of Education,* 333 U.S. 203 [1948]). Finally, in many cases the government, federal, state or municipal, does act in compliance with statutory law, as when it accords exemption from military service to religious pacifists, or provides for absentee voting when a primary or election day falls on

a religious holiday, or exempts from the sanctions of the compulsory school attendance law those children whose absence is dictated by the fact that a particular school day falls on a holiday sacred to them. See, *e.g.,* N.J. Stat. Ann. §§18.14-92.2; N.Y. Educ. Law §3210(1)(6).

Concluding this part of our brief, we urge that there is no validity to the claim that either Section 701(j) of the Civil Rights Act of 1964 or Guideline 1605.1 of the United States Equal Employment Opportunity Commission which preceded it, violates the Establishment Clause of the First Amendment to the Constitution.

POINT TWO

The challenged statute and guideline are necessary and proper measures for the enforcement of the Free Exercise Clause of the First Amendment.

The First Amendment bars not only laws respecting an establishment of religion but also measures that prohibit its free exercise. While we do not have in this case a statute or other formal governmental regulation forbidding an employer from making a reasonable accommodation to an employee's religious observance or practice, we believe that enactment of the statute challenged here was within the power of Congress, under the Necessary and Proper Clause of Article I, Section 8, of the Constitution, to carry out the provisions of the Free Exercise Clause of the First Amendment.

Preliminarily, it should be noted that, as petitioners concede, Congress had clear power, under the Commerce

Clause, to enact that part of the 1964 Civil Rights Act (Section 703(a)(1)) which forbids discriminatory employment practices on the basis of religion. The power of Congress under the Commerce Clause to enact Section 701(j), we submit, is equally clear.[2] Petitioners are in effect arguing here that this Court must restrict Congress' powers under the Commerce Clause in order to prevent an impairment of the Religion Clause. We suggest that, on the contrary, this Court may and should uphold the statute as a proper exercise of Congressional powers under both clauses. Such a result would be in harmony with the principle that the courts should read constitutional commands in a way that makes them consistent with each other rather than in a way that would require the sacrifice of one in order to carry out the other.

The power of Congress to act affirmatively to protect freedom of religion was strongly suggested by this Court in *Marsh* v. *Alabama,* 326 U.S. 501 (1946). The Court there held that, under the Free Exercise Clause, a company wholly owning a town could not bar colporteurs from distributing religious tracts on its streets. In reaching that result, the Court specifically suggested (although Justice Frankfurter expressed the view [at p. 511] that it was not necessary to do so) that the same result could have been reached by Congressional action under the Free Exercise Clause. It said (p. 507, n. 4):

> And certainly the corporation can no more deprive people of freedom of press and religion than it can

2. We do not, of course, suggest that, if Section 701(j) violates the Establishment Clause, it may nevertheless be upheld under the Commerce Clause. We believe we have shown, in Point One above, that it does not.

> discriminate against commerce. In his dissenting opinion in Jones v. Opelika, 316 U.S. 584, 600, ... which later was adopted as the opinion of the Court, 319 U.S. 103, 194, ... Mr. Chief Justice Stone made the following pertinent statement: "Freedom of press and religion, explicitly guaranteed by the Constitution, must at least be entitled to the same freedom from burdensome taxation which it has been thought that the more general phraseology of the commerce clause has extended to interstate commerce. Whatever doubts may be entertained as to this Court's function to relieve, *unaided by Congressional legislation,* from burdensome taxation under the commerce clause, ... it cannot be thought that that function is wanting under the explicit guaranties of freedom of speech, press and religion." (Emphasis added.)

The power of Congress to protect interstate commerce from interference, by burdensome taxation or otherwise, extends to interference by private enterprises like petitioner as well as to interference by states. In the present case, Congress *has* enacted legislation of the kind suggested in *Marsh.* What we are here suggesting is that that action can be viewed as an exercise of the Congressional powers under both the Commerce and Free Exercise Clauses.

We do not urge, nor is it necessary for this Court to decide that, if Section 703(a)(1), the EEOC Guidelines and the 1972 amendment had not been adopted, an employer would nevertheless be prohibited from barring Sabbatarians from employment by virtue of the Free Exercise Clause alone. We submit only that the Necessary and Proper Clause, invoked under the Free Exercise Clause, empowers Congress and the EEOC to adopt the statute and regulations that are challenged here. Just as this Court

found in *Marsh* that the predominant position of the company in the town required applying the protections of the Free Exercise Clause, Congress could properly find that the power of employers operating in interstate commerce to exclude Sabbatarians from employment constituted so serious a threat to their religious freedom as to require Congressional action, applicable to all employers alike, preventing such an exclusion. In this respect, the 1972 amendment stands on the same footing as the basic provision in the 1964 Act prohibiting discrimination based on religion. That provision also finds support in the power of Congress to protect the free exercise of religion, just as the prohibition of racial discrimination finds support in the power of Congress to implement the Fourteenth Amendment.

The trend of this Court's decisions in recent years has been toward broad interpretation and application of the Free Exercise Clause.[3] Thus, in *Sherbert* v. *Verner,* 374 U.S. 399 (1963), the Court held that a denial of unemployment compensation benefits to a worker who, like respondent herein, could not conscientiously accept employment that required her to work on Saturday, violated the Free Exercise Clause. In the case of *In re Jenison,* 375 U.S. 14 (1963), the Court held that a woman whose religious conscience forbade her from serving on juries because it would violate the Biblical command, "Judge not that ye be not judged," could not, consistent with the Free Exercise Clause, be held in contempt of court. And in *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), the Court held that the Free

3. For a fuller development of this point, we respectfully refer the Court to Pfeffer, The Supremacy of Free Exercise, 61 Georgetown L. Rev. 1115 (1973).

Exercise Clause forbade prosecution under a state's compulsory school attendance law of Amish parents whose religious consicence would not allow them to send their children to secondary schools.

We submit that equal liberality in the interpretation of the First Amendment is called for when the Court passes on the validity of a Congressional enactment which has both the intent and effect of protecting the free exercise of religion. In such a case, the classic words of John Marshall in *McColluch* v. *Maryland,* 17 U.S. (4 Wheat.) 316, 421 (1819), are particularly appropriate:

> . . . Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

The conclusion we urge here was reached in *Jordan* v. *North Carolina National Bank,* 399 F. Supp. 172, 179-80 (W.D.N.C. 1975), a well-reasoned decision that we commend to the Court's attention. In the last paragraph of that part of the District Court's opinion which deals with the Free Exercise claim, the Court said:

> Congress, as evidenced by the debates relating to the 1972 Amendments to Title VII felt §2000e(j) furthered First Amendment freedoms. Senator Harrison Williams in discussing §2000e(j) quoted the pertinent portion of the First Amendment and stated "In dealing with the free exercise thereof, really, this [i.e., §2000e(j)] promotes the constitutional demand in that regard." "Legislative History of the Equal Employment Opportunity Act of 1972", p. 715.

TWA seeks to distinguish *Sherbert* v. *Verner* on the ground that in the present case the District Court "found that it was 'coincidental' that the applicable seniority system, and hence employment relationship, acted to compound Hardison's problem in exercising his religion" (TWA Brief, p. 33). We are unable to see how the situation in *Sherbert* was less "coincidental" or more a direct violation of the Free Exercise Clause than the situation in the present case.

Nor are we able to appreciate the cogency of the other grounds suggested in the TWA brief (in footnote 18 on p. 34) for distinguishing *Sherbert*. First, it notes that "the state statutory scheme there at issue was not evenhandly applied in that it actually and affirmatively discriminated against Saturday as contrasted to Sunday worshippers," whereas in the present case "the seniority provision was uniformly applied." We suggest, however, the fact that TWA may be violating the Free Exercise rights of Sunday observers does not constitutionally justify its violation of those rights in respect to Sabbatarians.

TWA argues further that "the plaintiff would have been 'destitute' in *Sherbert;* whereas Hardison plainly could seek out employment not requiring Saturday work." We are unaware of any authority to support the proposition that the Free Exercise Clause protects only the destitute, and we take note that, if Section 701(j) and the regulation are voided, Hardison and others like him will in fact be threatened with destitution because of difficulties in finding employment consistent with their religious principles.

"Finally," the TWA brief argues, "in *Sherbert,* unlike here, no other person's rights would be directly and ad-

versely affected by denial [*sic,* "granting" was probably intended] of benefits." This assertion is hardly accurate. The granting of benefits to Mrs. Sherbert certainly affected to some extent the claimed rights of the employer and the taxpayers whose enforced contributions went to pay her benefits. Translating *Sherbert* into the terms of the statute and regulation in issue here, granting Mrs. Sherbert unemployment benefits did not impose "undue hardship" upon employers or taxpayers.

As it did in *Sherbert,* this Court in the case at bar must protect respondent Hardison from the needless requirement of choosing between gainful employment and following the religious dictates of his conscience. To do less would be to deny the principle of religious liberty which drew the earliest settlers to our shores.

For the Establishment and the Free Exercise Clauses of the First Amendment are nothing more than the two sides of that principle of religious liberty upon which our Republic was founded.

Conclusion

It is respectfully submitted that, for the reasons stated above, this Court should affirm the ruling of the court below upholding the constitutionality of §701(j) of the Civil Rights Act of 1964, as amended, and EEOC Guideline 1605.1.

Respectfully submitted,

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February, 1977

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 75-1126 and 75-1385

TRANS WORLD AIRLINES, INC., *Petitioner*
and
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT 142, AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS LOCAL LODGE 1650, *Petitioners*

v.

LARRY G. HARDISON, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION OF GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

AND

BRIEF FOR THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, *AMICUS CURIAE*

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MOTION OF GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The General Conference of Seventh-day Adventists respectfully moves this Court for Leave to File in this case the accompanying Brief as Amicus Curiae. The

consent of the Attorney for the Petitioner, International Association of Machinists and Aerospace Workers, herein has been obtained, and the Attorney for the Respondent Larry G. Hardison has also given his consent to the filing of such a Brief. However, the petitioner, Trans World Airlines, Inc., has indicated that it would neither object nor consent to the filing of such a brief.

The Applicant, General Conference of Seventh-day Adventists, has significant interest in this case on behalf of its individual church members, who number in excess of 470,000 in the fifty States and the District of Columbia. The issues before this Court arise out of the observance of a religious tenet and a charge of religious discrimination filed under the Equal Employment Opportunity Act.

Throughout the United States there are a significant number of religious discrimination cases involving members of the Seventh-day Adventist Church pending in both federal and state courts. The decision in this matter will directly affect the outcome of those cases.

In addition, the developing law to which this case is addressed will affect the future employment opportunities of all Sabbatarians. The Seventh-day Adventist Church has, therefore, a vital interest in this matter.

The Brief of the Applicant herein is directed toward the interests of the Respondent. Applicant, however, believes that the impact of this case as it affects members of the Seventh-day Adventist Church and other Sabbatarians is not adequately presented by the Petitioner. The concern of the Seventh-day Adventist Church for the substantial number of its members affected by the holding in this case prompts the filing of this Motion.

Respectfully submitted,

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v.

LARRY G. HARDISON, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, *AMICUS CURIAE*

INTEREST OF THE *AMICUS CURIAE*

The *amicus curiae* is a religious denomination whose membership follows the command of the Bible that the Sabbath, the Seventh-day, be set aside from work and other worldly endeavors.[1] The respondent here is a

---

[1] The observance of the Sabbath for Seventh-day Adventists is

member of another denomination observing the Sabbath. The interest of the *amicus curiae* in the outcome of the case is obvious. Petitioners have argued that national laws and regulations intended to require employers to accommodate the religious needs of employees, including those who observe the seventh day as holy, are unconstitutional or should be construed in an unduly limited way. Adherents to the religious tenets of this denomination, as well as others who observe a day of rest because of their religious beliefs, will be directly affected by the judgment of the Court in this case.

QUESTIONS PRESENTED

1. Does the requirement of the 1964 Civil Rights Act that employers make reasonable accommodations to the religious needs of their employees constitute an

---

by no means an arbitrary, mechanical, ritualistic practice. Rather, they see a mandate for the Sabbath in the fourth of the Ten Commandments, where it is portrayed as a specific weekly memorial to the creative power of God and as the believer's invitation to a particular and personal fellowship with God (Exodus 20:8-11). As suggested by Deuteronomy 5:12-15, the observance of the Sabbath is a symbol also of man's creation in the image of God with the dignity of free choice and freedom from servitude.

We view the Sabbath as the day carefully observed by the man Christ Jesus and released by Him, as Lord of the Sabbath day, from the demeaning encrustations of human traditions (Luke 4:16; Matthew 12:1-13, Mark 2:27, 28). Also, as indicated in Hebrews 4, the Sabbath rest is both a symbol of the Christian's deliverance from the bondage of sin by the redemptive and creative power of Jesus Christ and of rest from his unavailing effort to earn salvation by the merit of his own works. More than a recommended religious practice, the observance of the Christian Sabbath is, for Seventh-day Adventists, a sign of the restored harmonious relationship between the believer and his Creator-Redeemer (Ezekiel 20:12).

"establishment of religion" forbidden by the First Amendment?

2. Is the regulation of the Equal Employment Opportunity Commission requiring reasonable accommodation a proper implementation of the purpose of the 1964 Civil Rights Act?

3. Did Trans World Airlines, Inc., improperly fail to make a reasonable accommodation to Larry G. Hardison's religious need to avoid work on his Sabbath?

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATION INVOLVED

Constitution

Article 1, Section 8 provides: "The Congress shall have power . . . to regulate commerce with foreign nations and among the several states...."

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."

The Fourteenth Amendment, Sections 1 and 5, provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law...." "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

Statutes

Section 703(a)(1) of the Civil Rights Act of 1964, as amended, provides:

> —It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against

any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . . 42 U.S.C. § 2000e-2(a)(1) (1974).

Section 701(j) of the Civil Rights Act of 1964, as amended, provides:

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. 42 U.S.C. § 2000e(j) (1974).

Section 703(h) of the Civil Rights Act of 1964, as amended, provides:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply . . . different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . . 42 U.S.C. § 2000e-2(h) (1974).

Section 703(c) of the Civil Rights Act of 1964, as amended, provides:

It shall be an unlawful employment practice for a labor organization—

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportuni-

ties, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section. 42 U.S.C. § 2000e-2(c) (1974).

Regulation

Guideline 1605.1 of the United States Equal Employment Opportunity Commission provides:

(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

(b) The Commission believes that the duty not to discriminate on religious grounds required by Section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious belief, the

employer has the burden of proving that an undue hardship renders the required accommodation to the religious needs of the employee unreasonable.

(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people. 29 C.F.R. § 1605.1 (1975).

STATEMENT OF THE CASE

It is not necessary in this *amicus curiae* brief to recite all possibly relevant facts, but we do summarize those that appear to be crucial.

Larry Hardison, the respondent, was employed by Trans World Airlines, Inc. ("TWA") at its overhaul base in Kansas City, Missouri. His job at the Stores Department included the delivery of parts and materials to mechanics for the purpose of repairing, maintaining, and overhauling aircraft and engines (A. 23).[1] While working in Building No. 2, in March, 1969, he found a conflict between his work schedule, which demanded Saturday work for at least two weeks, and his religion, the Worldwide Church of God, which proscribed work on the Sabbath, i.e., between sundown Friday and sundown Saturday. Hardison met with the manager of the Stores System, Everett Kussman, who represented TWA, and with James Tinder, a shop steward of District 142 of the International Association of Machinists and Aero Space Workers (the "union"). A number of possible accommodations were discussed. Hardison was willing to work a four-day

[1] Reference to "A. ——" is to the Appendix filed in this Court.

week or a six-day week (A. 71). Although more than 200 men were capable of performing Hardison's work (A. 134), TWA rejected the four-day alternative because the company would then have had either to utilize a supervisor or an employee responsible for another job to perform Hardison's duties or to pay overtime to another employee to take Hardison's place (A. 125, 146). TWA also rejected the six-day alternative because, under the collective bargaining agreement, that alternative apparently was barred by the 40-hour per week clauses (A. 71). A third alternative was that someone might voluntarily swap days off or regular shifts with Hardison. Hardison indicated that another employee unhappy with his shift was willing to change shifts with him (A. 83-84, 110). Kussman had no objection to a swap, but neither he nor any other TWA representative made any effort to implement a swap or requested the union to accept a swap, which apparently was thought to be inconsistent with the terms of the collective bargaining agreement (A. 157, 238). The union took no steps to work out any swap of shifts or days off (A. 158, 238). An alternative that apparently was not discussed was that someone of greater seniority might actually be assigned to work on Saturdays with Hardison assigned to work on other days. This alternative was also barred by the collective bargaining agreement. Thus, no accommodation was offered to Hardison that would have relieved him of Saturday work. He subsequently did not report for work on successive Saturdays. In order to minimize the conflict with his religious beliefs, Hardison switched to a twilight shift that included Friday afternoon and evening work; he left work once at sundown on Friday, the time his Sabbath began (A. 170-71). He was then discharged for insubordination.

Because the sole basis for Hardison's discharge was his failure to work during his Sabbath, and TWA and the union had failed to make any accommodation that would have permitted him to refrain from Sabbath work and keep his job, Hardison filed an unlawful employment practice charge with the Equal Employment Opportunity Commission. He claimed that TWA and the union had failed to meet their statutory duty to refrain from religious discrimination under the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), 2(c), a duty that had been interpreted by an EEOC regulation to require employers "make reasonable accommodations to the religious needs of employees . . . where such accommodations can be made without undue hardship on the conduct of the employer's business." 29 C.F.R. § 1605.1 (1975). When administrative remedies had been exhausted, Hardison brought this action against TWA and the union in the district court, which held that no statutory violation had occurred. 375 F. Supp. 877 (W.D. Mo. 1974). Hardison then appealed to the court of appeals for the Eighth Circuit, 527 F.2d 33 (1975). Considering the lower court's judgment in favor of the union not to be "directly challenged upon appeal," the court of appeals did not pass on its propriety. It reversed the district court's judgment in favor of TWA, holding unanimously that TWA had violated Title VII of the Civil Rights Act by failing to make reasonable accommodation and further holding that the reasonable accommodation requirement was constitutional.

SUMMARY OF ARGUMENT

I

The Civil Rights Act of 1964, 42 U.S.C. § 2000e-2a (1974), bars discrimination in employment because of an individual's religion, and a 1967 Regulation of the

EEOC, 29 C.F.R. § 1605.1 (1975), interprets the Act to require employers to make reasonable accommodations to the religious needs of employees and prospective employees, so long as those accommodations do not impose undue hardsip on the conduct of their businesses. The only constitutional issue in the case is whether the "reasonable accommodation" requirement violates the Establishment Clause of the First Amendment. Nevertheless, an understanding of the sources of Congressional power helps to clarify the relevancy of the Establishment Clause. Both as a means of attacking intentional discrimination and as an additional method of promoting equal employment opportunity, Congress may under the Commerce Clause bar practices that discriminate in effect on religious grounds, as well as practices that discriminate in effect on racial grounds. It may, therefore, properly require employers to make adjustments in work schedules to accommodate claims of religious conscience. Congress also has power to require reasonable accommodation under the First and Fourteenth Amendments. It may forbid private religious discrimination that is largely the product of government action. Both the work schedules of state and federal government agencies and Sunday Closing laws significantly influence work schedules in the private sector. Congress may ameliorate the harmful indirect effects on Sabbatarians and others of these government laws and practices by requiring private employers to make reasonable accommodations.

The reasonable accommodation requirement does not violate the Establishment Clause. This requirement is not arbitrary since a factual showing that the "accommodation" will produce "undue hardship" on the employer is sufficient to render this statutory obli-

gation unreasonable. To impose a statutory guideline sensitive to individual conscience and protective of the "free exercise" of religion is not presumptively "establishment" of religion. It does not share any of the characteristics of practices which this Court has held to be an establishment of religion. The government is not supporting one religious belief in preference to another or all religious beliefs in preference to irreligion. In barring practices that in effect discriminate against persons with particular religious views, it does in a sense aid those who would otherwise suffer discrimination but this hardly constitutes support. Rather, the government promotes the constitutional value of voluntarism.

Reasonable accommodation does not interfere with the religious liberty of employers or other employees. Nor does it force them to support any religion. Some, though not all, required accommodations undoubtedly require the employer to bear some cost, but no financial benefit is conferred on the employee who needs accommodation or on his church. The cost an employer may bear to eliminate discrimination in effect on religious lines is similar to the cost he may bear under *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), to eliminate discrimination on racial lines. It is taken for granted that a straight ban on intentional racial discrimination is constitutional, even though an employer may also have to bear costs to prevent such discrimination. Thus, it is plain that employer costs do not constitute forbidden support of the religion of employees who would otherwise suffer religious discrimination. For similar reasons, the fact that some other employees, as a consequence of reasonable accommodation, may have work

schedules slightly less desirable than the ones they would otherwise have does not mean these employees are being forced to support the religion of the employee who needs accommodation.

Despite petitioners' claims to the contrary, the requirement of reasonable accommodation does not impermissibly prefer religion over irrelegion or one religion over another. The benefits of the act are by no means limited to members of particular religious groups, and they have been extended even to atheists, since the EEOC, properly, is using a broad definition of religious need drawn from the conscientious objector cases. Even if the requirement benefited only religious believers, it would be a permissible accommodation to religious conscience under the Free Exercise Clause. Petitioners place great stress on the fact that the requirement does favor those with religious claims not to work on particular days as compared with those who for personal reasons would prefer not to work on certain days. Such a distinction is undeniably drawn, but it is well established that the government may treat those who are conscientiously opposed to performing certain acts differently from those who for nonconscientious reasons would wish not to perform them.

The court of appeals correctly held that reasonable accommodation does not violate the threefold test of establishment as formulated in *Committee for Public Education v. Nyquist,* 413 U.S. 756, 772-73 (1973). That test, if it is to apply to all establishment cases, must be read flexibly to incorporate the complex interplay of relevant constitutional values, including permissible accommodation to the free exercise of religion. The elimination of discrimination in effect along re-

ligious lines, a part of a general congressional purpose to eliminate various types of discrimination, is a clearly secular purpose under any understanding of the *Nyquist* test. The main effect of eliminating such discrimination neither advances nor inhibits religion. It is true that attacks on discrimination benefit members of groups that would otherwise be discriminated against, but this effect is an inevitable, indirect, and remote consequence of eliminating discrimination, associated in precisely the same way with bans on intentional religious discrimination as with required accommodation.

Even if relief of burdens on religious exercise were regarded as the main purpose and effect of reasonable accommodation, the requirement would be constitutional. This Court has held that such a purpose and effect is a permissible basis for excusing conscientious objectors from military service, *see, e.g. Gillette v. United States,* 401 U.S. 437 (1971), and is a required basis for relieving Amish children of school attendance obligations, *Wisconsin v. Yoder,* 406 U.S. 205 (1972). More relevantly, the Court has indicated that Sabbatarians may be exempted from Sunday Closing laws, *Braunfeld v. Brown,* 366 U.S. 599 (1961), and that they must be allowed unemployment compensation though unavailable for Saturday work. *Sherbert v. Verner,* 374 U.S. 398 (1963). In each instance, relief from burdens on religious exercise was a main purpose and effect of permitted or required accommodation. Such relief obviously is not always rendered unconstitutional by the *Nyquist* test. Given the holding of *Sherbert,* it must be permissible for the government to accommodate its own work schedules to the religious needs of its own employees. In terms of secular pur-

pose and primary effects that neither advance nor inhibit religion, a government requirement that private employers similarly accommodate is indistinguishable.

Reasonable accommodation does not produce excessive entanglement of government with religion. No continued government monitoring of religious institutions is involved. The government does stand ready to resolve disputes between employers and employees, but most disputes that have arisen under the Act have involved only the question of how much hardship the employer must undertake, not a religious question at all. Occasionally the EEOC and courts may have to decide if a claim is "religious" or sincere, but not nearly so often as was required in the administration of the conscientious objector program. Indeed, since it need deal only with unresolved disputes, the government's involvement will be markedly less than is needed to administer reasonable accommodation to its own employees.

Nor will reasonable accommodation promote divisiveness; quite the contrary. Even if occasional individual resentment could rise to the kind of political divisiveness that has worried the Court, the requirement of reasonable accommodation eliminates a much more significant source of divisiveness-employment practices that discriminate in effect along religious lines and thus invite agitation along those lines in opposition or support of existing practices.

II

The EEOC requirement of reasonable accommodation properly reflects Congress' intent in enacting Title VII of the 1964 Civil Rights Act. That require-

ment serves the Congressional aim of ending discrimination; is entitled to the deference due agency judgment; is consonant with this Court's treatment of practices discriminating in effect on racial lines, *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971); and has been unqualifiedly endorsed by a Congressional amendment clarifying the original statutory meaning.

TWA failed to make a reasonable accommodation to Hardison's religious needs. It did not actually offer him any accommodation that would have resolved his conflict between work schedule and religious belief, and it failed to show that possible accommodations would have imposed undue hardship on the conduct of its business. The points on which the court of appeals disagreed with the district court concerned the interpretation of the key terms of the applicable legislative standard and the kind of evidence needed to satisfy an employer's burden of proving undue hardship. These are obviously matters on which an appellate court reviews a trial court, and the court of appeals correctly rejected the district's courts unduly weak reading of the reasonable accommodation requirement.

TWA failed to make accommodations that were reasonable but which may have varied from the terms of its collective bargaining agreement with the union. It failed even to encourage the union to agree to a variance. Under the Civil Rights Act a union may be responsible for causing an employer to discriminate. The employer and union cannot join together to write a broad, rigidly formulated, collective bargaining agreement that will bar reasonable accommodations, and then refuse to permit variances. Section 703(h) of the Civil Rights Act of 1964, which concerns bona fide seniority systems, does not affect this conclusion.

That section was not intended to define which practices constitute present violations of the main statutory provisions. Seniority arrangements that lead employers to discriminate cannot be a basis for excusing the discrimination. Although collective bargaining agreements may create employee expectations, these expectations do not override powerful statutory policies, especially when, as in this case, accommodations are possible that would not defeat any significant expectations.

TWA did not take steps to require a switch in shift assignments to accommodate Hardison or even to ascertain if some other employee wished to make a voluntary switch. The vague potentiality of employee resentment, a union grievance, or other claims of religious need obviously did not amount to a showing of undue hardship.

Even if it were decided, incorrectly in our view, that an employer is not required to take steps varying from the terms of the collective agreement without union consent, still TWA failed to fulfill its statutory duty. At the very least, it should have positively encouraged union consent to a variance, especially since the Union Relief Committee did recommend variances for special family and health reasons, and a voluntary switch of shifts would have defeated no substantial employee expectations. TWA did not take a single step to encourage the union to agree to a variance.

The statutory framework which recognizes collective bargaining as an instrument of industrial and labor peace is a creation of Congress. A contractual product of the bargaining process cannot be presumed to constitute a bar to subsequent Congressional action protective of First Amendment or other Constitutional mandates. The Civil Rights Act of 1964 in its original form and as

amended reflects a clear Congressional intent to enhance Constitutional guarantees in commerce including application to the collective bargaining system previously given statutory recognition by Congress.

TWA also failed to meet the reasonable accommodation requirement by refusing to make accommodations that were consistent with the collective bargaining agreement. It refused to pay another worker overtime to fill Hardison's slot when he was scheduled for Sabbath work, yet this cost was plainly manageable. Despite some conclusory observations about the problems of relying on employees who fill in, TWA failed to show that its work would be at all impaired by such an arrangement. It also refused to have Hardison's work done by another employee on duty or by a supervisor. Although Hardison had actually been absent three Saturdays in a row and TWA, therefore, had ample experience with what the impact of his absence was, it failed to provide any detailed evidence of how its operations would be harmed if someone were required to cover for him. The court of appeals correctly concluded that TWA had not carried its burden of proving undue hardship.

Petitioners' position seems to be that an employer is not required to undertake on its own or even encourage union agreement to cost-free accommodations that vary from the terms of collective bargaining agreements, nor is an employer required to undertake any accommodation that imposes some costs on it. Petitioners must be right about both points for the conclusion to be reached that TWA met its statutory duty. Since petitioners' interpretation of the "reasonable accommodation" requirement would almost totally vitiate a significant guarantee of equal employment opportunity, it is unacceptable. It follows that TWA plainly failed to satisfy the reasonable accommodation requirement.

ARGUMENT

I

A Congressional Requirement That Employers Make Reasonable Accommodations To The Religious Needs Of Employees Is Within The Legislative Powers Of Congress And Is Consistent With The Establishment Clause Of The First Amendment.

A. Congress May Require Reasonable Accommodations to the Religious Needs of Employees Under Its Power to Regulate Foreign and Interstate Commerce and Under Its Power to Enforce the First and Fourteenth Amendments.

This case directly involves Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2a (1974), which bars discrimination in employment because of an individual's religion, and a 1967 Regulation of the Equal Employment Opportunity Commission, 29 C.F.R. § 1605.1 (1975), which interprets the 1964 Act as requiring employers to make reasonable accommodations to the religious needs of employees and prospective employees, so long as these accommodations do not impose undue hardship on the conduct of the employer's business. The only constitutional challenge to the reasonable accommodation requirement thus imposed is based on the claim that it violates the Establishment Clause of the First Amendment. Petitioners have not doubted that in the absence of this constitutional limit, Congress would have the power to impose such a requirement on employers covered by the Act. Nevertheless, we believe a summary discussion of the sources of Congressional power is useful because it will help clarify the relevancy of the Establishment Clause.

1. *Congress Has Power Under the Commerce Clause to Require Accommodation to Religious Needs of Employees.*

It is unquestioned that the Congress under its authority to regulate commerce with foreign nations and among the several states, Art. I, § 8, may ban intentional religious discrimination by employers like TWA whose businesses affect commerce. Congress has extensive power to control the incidents of employment of firms that affect commerce. Discrimination that excludes members of racial or religious groups from employment or disadvantages them in conditions of employment touches not only the particular firms involved but also the general course of commerce. *Cf. Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964); *Katzenbach v. McClung,* 379 U.S. 294 (1964).

The reasonable accommodation requirement is, among other things, a proper means of carrying out a policy against intentional discrimination. If Title VII had barred only intentional religious discrimination, an employer who wished to discriminate could do so by erecting facially neutral work schedules which, in fact, excluded members of particular religions. In theory, of course, it would be open to an employee to prove a discriminatory motive, but often that would be difficult and almost always it would be expensive and time-consuming. Requiring reasonable accommodation to the religious needs of employees avoids the difficulty of forcing an employee to prove improper motive in each case, and thus makes effective a policy against intentional discrimination. That Congress may choose appropriate means to accomplish permissible ends and that the courts will accept Congressional determinations about the necessity of its chosen means are long established constitutional principles. *See McCulloch*

v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). It is also well established that Congress may, in order to make a regulation of interstate commerce effective, decide upon practical classifications that reach some transactions beyond those that are the primary subject of its concern. *See, e.g., United States v. Darby,* 312 U.S. 100, 121 (1941); *Perez v. United States,* 402 U.S. 146 (1971). Even if Congressional power were limited to the abolition of intentional discrimination and the religious accommodation requirement reached some situations in which no intentional discrimination had occurred, the requirement would still be an entirely appropriate means of attacking religious discrimination. *Cf. South Carolina v. Katzenbach,* 383 U.S. 301 (1966).

The religious accommodation requirement can also stand on its own feet as barring employment practices which, though not the product of intentional discrimination, in effect discriminate against members of certain religions. Sometimes these practices may reflect simple judgments about convenience and efficiency, but often these practices reflect a kind of religious prejudice that is much more subtle and less self-conscious than purposive mistreatment of those of differing religious faiths. *Cf.* Brest, *The Supreme Court, 1975 Term —Foreword: In Defense of the Anti-discrimination Principle,* 90 Harv. L. Rev. 1, 14 (1976).[3] Under its

[3] A supervisor may fail to accommodate the needs of Orthodox Jews or Moslems in their work schedules not because he intends to discriminate on religious grounds, but because he somehow regards persons who make such unusual requests as "oddballs" or insincere, potential troublemakers he would do well not to encourage. Because people find it hard to identify sympathetically with those who seem "different," persons whose religious needs mark them as unusual suffer in ways much more complex than overt, self-conscious religious discrimination.

commerce power, Congress may regulate not only practices of intentional discrimination but also practices that have a disproportionate disadvantageous impact on members of particular groups. These may be an important aspect of the employment practices of particular employers and, like intentional discrimination, they can have an important effect on commerce by significantly affecting employment relations and opportunities for employment. Congress may proscribe "practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). In holding that Congress had required the removal of "unnecessary barriers to employment" that operate "to discriminate on the basis of racial or other impermissible classification," whether or not the barriers were the product of intentional discrimination, 401 U.S. at 431, 432, this Court, in *Griggs*, found it unnecessary even to discuss the question of constitutional authority, deeming it obvious that Congress had the power to reach such practices. Thus, there can be no doubt that Congress has the constitutional power under the Commerce Clause to require reasonable accommodation unless it is precluded from doing so by a specific constitutional limitation.

2. *Congress May Require Reasonable Accommodation Under Its Power to Enforce the Free Exercise Clause of the First Amendment and the Due Process Clause of the Fourteen Amendment*

Under the enforcement clause of the Fourteenth Amendment, Congress may prohibit activities which are not directly forbidden by Section 1 or other sections of the Amendment. *See Katzenbach v. Morgan,*

384 U.S. 641 (1966); *United States v. Guest,* 383 U.S. 745 (1966) (concurring opinion of Clark, J., and dissenting opinion of Brennan, J.). The religion clauses of the First Amendment have been made applicable against the states by the due process clause of the Fourteenth Amendment, *Cantwell v. Connecticut,* 310 U.S. 296 (1940); *Everson v. Board of Education,* 330 U.S. 1 (1947), so Congress's power to enforce the Free Exercise Clause includes the power to deal with religious discrimination. Under the Necessary and Proper Clause, Art. 1 § 8, Congress also has power to pass legislation enforcing the religious guarantees of the First Amendment itself.

It may well be that under section 5 of the Fourteenth Amendment, Congress has the power to forbid any private religious discrimination that is not itself constitutionally protected (as, for example, is the right of a church to select a pastor on religious grounds). Six justices in *United States v. Guest, supra,* endorsed the proposition that Congress may forbid some forms of private interference with private activity when that interference is based on racial animosity. Although the opinions in that case discussed private interferences with private attempts to use public facilities, the constitutional principle can not sensibly be limited to the use of public facilities. *See Cox, The Supreme Court, 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights,* 80 Harv. L. Rev. 91, 115-119 (1966). A number of courts of appeals, relying on *Guest and Griffin v. Breckenridge,* 403 U.S. 88 (1971), have concluded that section 5 of the Fourteenth Amendment grants Congress broad power to reach private discriminatory acts, whether or not use

of public facilities is involved.[4] For example, in *Action v. Gannon, supra* note 4, a case in which state facilities were in no way involved, the court held that 42 U.S.C. § 1985(3) reaches organized private disruption of religious services, and that such coverage is constitutional. The court said that Congress has "the constitutional power to enact direct legislation to secure the rights of citizens against violation by individuals as well as by states." 450 F.2d at 1237. If Congress can permissibly forbid the disruption of services involved in *Gannon,* it can also forbid religious discrimination in employment and require reasonable accommodation to religious needs.

Although we believe the approach of *Action v. Gannon* and similar cases to be sound and applicable to this case, we do not develop the point further because a much less sweeping and much less debatable approach demonstrates the appropriateness of requiring reasonable accommodation as a measure to enforce the First and Fourteenth Amendments. Such a requirement is a proper means of ameliorating the effects of government action that inhibits the free exercise of religion.

Certain laws and government practices have the effect of inhibiting the free exercise of religion. Sunday Closing laws, for example, although not unconstitutional, *McGowan v. Maryland,* 366 U.S. 420 (1961); *Braunfeld v. Brown,* 366 U.S. 599 (1961), do undoubtedly place a special burden on the exercise of religion of those whose faith requires them to abstain from

[4] *See Westberry v. Gilman Paper Co.,* 507 F.2d 206, *vacated as moot,* 507 F.2d 216 (5th Cir. 1975); *Action v. Gannon,* 450 F.2d 1227 (8th Cir. 1971); *Richardson v. Miller,* 446 F.2d 1247 (3d Cir. 1971).

work on some day other than Sunday. The government, though it need not, may appropriately take steps to relieve these burdens. Just as it may exempt conscientious objectors from military service, *see, e.g., Gillette v. United States,* 401 U.S. 437, 453 (1971), so also may it exempt Sabbatarians from Sunday Closing laws. *See Braunfeld v. Brown,* 366 U.S. at 608; *McGowan v. Maryland,* 366 U.S. at 520 (separate opinion of Frankfurter, J.). Missouri is one of many states with a Sunday Closing law, Missouri Revised Statutes § 563.721 (1969), and, as in all states, most of its government offices are themselves closed on Sunday. Many private businesses throughout the country that are not compelled to close on Sunday will choose to shut down completely on that day or to operate on less than full scale; that decision will be largely influenced by the fact that many other private firms are compelled to close and by the fact that virtually all government offices are closed. Even the decision of many states to exempt Sabbatarians from Sunday Closing law requirements inhibits the religious exercise of those who worship on Sunday but work, or seek work, with employers who rely on the exemption to remain open on Sunday and insist that employees work that day. *Cf. Braunfeld v. Brown,* 366 U.S. at 609.

Both state and federal governments are very much implicated in the work schedules of most private firms; therefore, the disadvantages that Sabbatarians and others suffer in respect to employment are significantly the product of government action. Congress could perhaps solve the problem by abolishing all Sunday Closing laws, keeping federal offices open on Sunday and requiring state agencies to do the same. But then the benefits of a uniform day of rest would be

sacrificed, *see McGowan v. Maryland, supra; Braunfeld v. Brown, supra,* and many Sunday worshipers might be inconvenienced. Instead, Congress has moderated the burden on religious exercise created indirectly by government actions, by requiring private employers to accommodate to the religious needs of their employees. *Katzenbach v. Morgan, supra,* establishes that Congress need not attack impairments of constitutional rights directly. The first theory of that opinion assumes that New York's English literacy test was itself constitutionally unassailable but that the test could be abolished as an indirect means of counteracting discriminatory treatment in public services. 384 U.S. at 651. Required religious accommodation by private employers counteracts one important effect of government action that burdens the free exercise of religion, and is, therefore, within Congress's power to enforce the guarantee of religious freedom protected by the First and Fourteenth Amendments.

B. The Requirement That Employers Make Reasonable Accommodations to the Religious Needs of Employees Does Not Violate the Establishment Clause of the First Amendment.

1. *The Reasonable Accommodation Requirement Lacks Any of the Characteristics of an Establishment of Religion.*

As this Court has indicated, the basic purpose of the Establishment Clause is to reinforce the principle of religious liberty in American society. *See, e.g., Everson v. Board of Education,* 330 U.S. 1 (1947). If the government supports one religion in preference to other religions or all religions in preference to no religion, it injects itself into an area of choice committed to private decision by the Constitution, an area in which the government must remain neutral. The state may not support religious activities by financial grants, *see, e.g., Everson v. Board of Education,* 330 U.S. 1 (1947); *Lemon v. Kurtzman,* 403 U.S. 602 (1971); *Committee for Public Education v. Nyquist,* 413 U.S. 756 (1973), or demand that one private person support the religion of another, *see Everson supra,* or sponsor religious practices or doctrines, *see Engel v. Vitale,* 370 U.S. 421 (1962); *Abington School Dist. v. Schempp,* 374 U.S. 203 (1963); *Epperson v. Arkansas,* 393 U.S. 97 (1968), because such involvements, although not ecclesiastical establishments in the narrow historical sense, significantly engage the government on behalf of a particular position concerning religious questions. The reasonable accommodation requirement shares none of the characteristics of those practices which have been held to violate the Establishment Clause.

a. *Reasonable accommodation produces no government support of religion.*

The religious accommodations requirement does not involve government support of religious belief in any sense forbidden by the Establishment Clause. It neither mandates direct government financial support of religion nor government compulsion that private enterprises give financial support to religion. The requirement produces no government sponsorship of particular religious views or even of religion in general. The government in no way becomes entwined in the affairs of religious organizations. All that reasonable accommodation does is eliminate practices that discriminate in effect along religious lines.

The abolition of practices that discriminate does undoubtedly provide some indirect assistance to those who would otherwise suffer discrimination, but this type of "aid" to members of particular religions is hardly support of religion in the constitutional sense. As we argue *infra,* even if this help were construed as a form of aid to religion, it would be the type that represents a permissible accommodation under the Free Exercise Clause, and would not, therefore, be forbidden by the Establishment Clause.

In the absence of reasonable accommodation, some persons will be penalized in their employment either because their religion triggers intentional discrimination or because they find the demands of their employment inconsistent with the demands of their religious beliefs. Reasonable accommodation eliminates certain adverse consequences that would otherwise result from an individual's free choice about religion. Thus, the requirement strongly promotes the constitutional value of voluntarism by permitting people to make decisions concerning religious faith without fear of crippling disadvantages in secular life. *Cf. Gillette v. United States,* 401 U.S. at 453-54.

b. *Reasonable accommodation does not infringe the religious liberty of employers or other employees or compel them to support the religion of employees for whom accommodations are made.*

Reasonable accommodation does not impair the free exercise of religion of employers or require employers to support the religion of those to whom they must make accommodations. If legislation restricted the free exercise of religion of employers, it would ob-

viously be unconstitutional. Most employers covered by the statute are corporations, but even if one focuses on individual employers, it is hard to imagine how accommodation could violate their own religious precepts. It is also hard to imagine how working a shift consistent with his own religious beliefs could violate the religious liberty of an employee who works that shift to accommodate the religious needs of another employee. No such claim of denial of religious liberty is made here.[5]

Petitioners argue that the statute requires employers to support the religion of those to whom they accommodate. This argument is also ill-founded. Without question, the Establishment Clause forecloses government requirements that one private individual or group support the religion of another.[6] But the reasonable accommodation provision is not such a requirement even when an employer must bear some cost to make a required accommodation.

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[5] When, if ever, such a claim is seriously made it will be time enough to consider the application of the statute in that context. It suffices now to point out that some employers (other than churches and other religious organizations) may conceivably think that their religious beliefs require them intentionally to discriminate on religious, or even racial, grounds; yet such a possibility has never been thought to cast constitutional doubt on statutes forbidding such discrimination. A similarly remote possibility in respect to accommodations does not cast any doubt on the constitutionality of this statutory requirement.

[6] A law that forced private payments to particular churches would be as plainly invalid as one that authorized government payments. And if an employee said he could continue working only if his employer donated $1, or $.01, a week to the employee's church, the government could not compel such an "accommodation" because to do so would be unconstitutional.

Some required accommodations will involve no cost to the employer at all. The statute might, for example, merely induce an employer to find out if another employee is willing to work at a time when one employee must abstain from work for religious reasons. An easy switch of working times may prove to be possible involving no added expense or sacrifice in efficiency. It is obviously impossible to characterize such an accommodation as support; all the employer has done is to make a simple adjustment in schedule so that an employee may follow his own religious conscience.

Some required accommodations will involve a degree of cost for the employer but cost is not identical with support. The employer is not contributing to an employee's church; he is merely making an adjustment to eliminate a conflict between religious demands and the work schedule of the employee. Reasonable accommodation does not ordinarily confer any financial benefit on the employee who needs it,[7] nor, indeed, any other benefit except the right not to work at a particular time.

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[7] Although we are aware of no such case, it is conceivable that under a given collective bargaining agreement, the employee would have to be paid at overtime rates for working an alternative time, say Sunday. Such a case would raise a somewhat more substantial question of support, though we believe the payment of overtime to the employee who seeks accommodation would not constitute a compelled support of his religion. If the constitutional question were deemed serious, however, such a case could be handled by a denial of overtime pay, based on the determination that the relevant parts of the collective bargaining agreement are against public policy in that application. Or, possibly, accommodation itself would be denied in that context as not "reasonable" or as imposing "undue hardship."

What the employer must do about practices that discriminate in effect against employees with special religious needs is essentially the same as what he must do about criteria for employment that discriminate in effect against racial minorities. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). That decision requires the formulation of criteria for hiring and advancement that do not discriminate in effect against members of a racial minority. Suppose an employer establishes that his crude test for employment quite adequately screens out all unqualified applicants, but also screens out many qualified applicants, disproportionately black. The employer further establishes that the expense of a more sophisticated screening technique to measure individual applicants fairly will not "pay for itself" in improved job performance. The decisions leave no doubt what the employer must do. *See, e.g., Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971). He must abandon his crude test, even if on balance it will cost him more to have a fairer test. The employer must accept a limited sacrifice in economic efficiency to further the statutory policy of equalizing employment opportunity.

That is precisely what the reasonable accommodation requirement demands of the employer, no more. Title VII of the 1964 act compels elimination of employment practices that discriminate in effect against groups defined in terms of race, religion, national origin, and sex. Whether the practices relate to job qualifications or work schedules is irrelevant; employers may be required to make some modifications in their chosen procedures and even bear some modest costs to assure equal employment opportunity. The cost of modifying work schedules is no more a support of the re-

ligion of individuals affected than the cost of modifying testing procedures is a support of the race of individuals affected.

Finally, it should be noted that a corporate employer may have to bear some costs to eliminate intentional religious discrimination. A large enterprise may have to spend money on supervision and review of its individual hiring practices to see that discriminatory hiring does not occur. The result of the expenditure of money is a benefit to those who would otherwise have suffered discrimination on religious grounds. If some cost to the employer combined with some benefit to the employee with special religious beliefs constitutes forbidden support of religion, then a ban on intentional discrimination would violate the Establishment Clause as much as required reasonable accommodation. Conversely, if a ban on intentional discrimination is constitutionally permissible, so also is required accommodation.

Much less is required of the employer by the reasonable accommodation requirement than was deemed acceptable in *Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421 (1952). It is incontestable that an employer could no more be required to support the political party of an employee than his church; such a requirement would offend the speech clause of the first amendment. Many employers do not sympathize with the political preferences of their employees and some may not even believe in the country's basic political structure. Yet this Court upheld a state requirement that employers not only allow employees four hours to vote on election day but also compensate them for whatever portion of the working day that four-hour period included. In

considering if the state requirement was consistent with the Fourteenth Amendment, the Court did not even find it necessary to discuss First Amendment problems. If this accommodation, plus pay for no work, did not constitute forbidden compelled support of the political preferences of employees, then simple accommodation with substituted hours of work certainly does not constitute forbidden, compelled support of employees' religious preferences.

If the employer is not impermissibly being required to support the religion of the employee who receives accommodation, neither are other employees who may have to "fill in" for that employee, and who, therefore, may end up with a schedule that is slightly less preferable from their point of view than the schedule they might otherwise have had.

c. *The reasonable accommodation requirement does not constitute a forbidden preference of one religion over another or of religion over irreligion.*

Reasonable accommodation does not promote one religion at the expense of another. Since reasonable accommodation seeks to place all employees on an equal footing, it can hardly be an inducement to persons to join any particular religion. Therefore, the reasonable accommodation provision does not further religion but allows each religious sect to "flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson,* 343 U.S. 306, 313 (1952). Moreover, in some settings it will be members of dominant religious groups that require accommodation rather than members of religious minorities. The benefits of the act are in no way limited to members of particular re-

ligious groups, and in areas where many stores and other enterprises are open on Sunday, the act provides considerable protection for those who worship on Sunday.

TWA argues that reasonable accommodation unduly promotes religion at the expense of irreligion, but this argument is fallacious. The EEOC has treated as an expression of religious need any belief that would qualify as "religious" under *United States v. Seeger,* 380 U.S. 163 (1965), and the plurality opinion in *Welsh v. United States,* 398 U.S. 333 (1970). EEOC Decision No. 76-104, reported at CCH EEOC Dec. ¶ 6500. Thus it has properly interpreted the Act to include claims by those who are not religious believers in the traditional sense. In at least one case, a court of appeals has actually applied the Act in favor of an atheist who complained that she was forced to participate in meetings of employees that included prayers. *Young v. Southwestern Savings and Loan Ass'n.,* 509 F.2d 140 (5th Cir. 1975). Thus, the Act involves no preference for believers over nonbelievers.

Even if the statutory requirement benefited religious believers as compared with nonbelievers, it would not constitute an impermissible preference. The state cannot support religion in preference to disbelief or indifference, *see, e.g., Everson v. Board of Education,* 330 U.S. 1 (1947); *Torcaso v. Watkins,* 367 U.S. 488 (1961), but it can make concessions to strongly held claims of religious need and religious conscience. A concession regarding employment schedules given to employees with strong religious needs would be the kind of permissible accomodation under the Free Exercise Clause this Court approved in *Zorach v. Clauson,* 343 U.S. 306 (1952), and *Wisconsin v. Yoder,*

406 U.S. 205 (1972), and which three Justices believed a sufficient basis for upholding a conscientious objector exemption they believed was framed in terms of religious belief as ordinarily understood. *See Welsh v. United States,* 398 U.S. 333, 369-74 (1970) (dissenting opinion of White, J.).

Petitioners object that Sabbatarians are treated better than persons who would like to go fishing on Saturday. It is undoubtedly true that the statute draws a line between those who have a claim of conscience not to work at a particular time and those who would prefer not to do so for other personal reasons, but that is a permissible line to draw. The reasonable accommodation requirement is like a conscientious objector provision for employment; it mediates conflicts between employment schedules and the demands of religious conscience. The EEOC regulation, which speaks of "religious needs," is not meant to require accommodation to every activity that may include some religious observance. Suppose that an employee plans a vacation trip to the Middle East, that will include his visiting the Holy Land, seeing various religious shrines, and participating in worship services. He acknowledges that from the religious point of view it is a matter of complete indifference when he takes his vacation, but entirely for reasons of personal preference, he would like to go in May. Surely the employer need not treat his request for a May vacation more favorably than a similar request from another employee just because his vacation will involve religious observance. The point of the statute is to require accommodation when special days or times are designated for religious observance or for abstention from work, or when follow-

ing the ordinary schedule of employment is otherwise inconsistent with religious conscience. The conscientious objector cases clearly establish that the government may confer relief from burdens for those who cannot conscientiously shoulder them without conferring relief on all those who desire it. No doubt, many young men would have preferred alternative service to military service, but unless they were conscientious objectors they did not qualify for the exemption. In distinguishing persons with religious claims of conscience not to work at particular times from those with reasons of another personal preference, the Act and regulation mark a line of undoubted constitutionality. *See Sherbert v. Verner,* 374 U.S. 398 (1963).

2. ***The Court Below Correctly Held That the Reasonable Accommodation Requirement Has A Clearly Secular Purpose, Has A Primary Effect That Does Not Advance or Inhibit Religion, and Does Not Involve the Government in Undue Entanglement With Religion.***

In cases involving prayers in public schools and various forms of financial relief or support for sectarian institutions, this Court has developed a threefold test of forbidden establishments, *see, e.g. Abington School Dist. v. Schempp,* 374 U.S. 203 (1963); *Walz v. Tax Commission,* 397 U.S. 664 (1970); *Lemon v. Kurtzman,* 403 U.S. 602 (1971). The court of appeals in this case, 527 F.2d, at 43, applied the test as formulated in *Committee for Public Education v. Nyquist,* 413 U.S. 756, 772-73 (1973). To be constitutional under that formulation a law (1) must reflect a clearly secular purpose, (2) must have a primary

effect that neither advances nor inhibits religion, and (3) must avoid excessive government entanglement with religion. The court of appeals correctly concluded that the religious accommodation requirement met each of the three criteria.

Given the complex interplay of constitutional values and the variety of actual holdings in religion cases, it is obvious that if any test is to prove usable for different kinds of problems, its terms must be interpreted in light of relevant values and not given a narrow and wooden interpretation. As Justice Stewart wrote for the plurality in *Meek* v. *Pittinger,* 421 U.S. 349, 359 (1975), "the tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." More particularly, it cannot be true that every attempt to accommodate religion is rendered unconstitutional by the demand of the *Nyquist* standard that legislation have a primary effect that does not aid religion, since this Court has clearly indicated that some accommodations are constitutionally required by the Free Exercise Clause and others are allowable.

If the *Nyquist* test is properly understood, the statutory requirement of reasonable accommodation is valid whatever is seen as its purpose and effect. But, even if the terms of the test are interpreted in the narrow and improper way petitioners urge—one that fails to take account of permissible accommodations to the free exercise of religion—the statutory requirement still is valid. We begin with that analysis; subsequently we consider the proper interpretation of the purpose and effect test in this context.

a. *The elimination of religious discrimination is the predominant statutory purpose and is clearly secular.*

The purpose of the 1964 Act was to forbid employment discrimination of various sorts. There is apparently no dispute that the elimination of intentional discrimination on religious grounds, as well as grounds of sex, race, and national origin, is a valid secular purpose; if it were not every state and federal bar on private religious discrimination would be unconstitutional. If it is a secular purpose to prevent intentional religious discrimination, it is also a secular purpose to eliminate practices that have the effect of discriminating against members of varous religious groups even if those practices do not reflect intentional religious discrimination. Moreover, since the Act reaches practices that have the effect of disadvantaging members of other protected groups, its coverage of practices that discriminate in effect against persons with particular religious persuasions can hardly be the consequence of a forbidden purpose.

Of course, the purposes of the 1972 amendment, 42 U.S.C. § 2000e(j), have no direct relevance to this case, but even if they did, the conclusion would be the same. That amendment made specific what was already the law. The aim of Senator Randolph, the amendment's sponsor, was to make clear that employment practices that discriminate in effect against members of particular religious groups were barred by the 1964 act. *See* 118 Cong. Rec. 705-06. Suppose, however, it were somehow determined that Senator Randolph had an improper motive; that motive could hardly be subscribed to the whole Congress, especially when the amendment

was framed as a clarification of the original Act rather than an addition to it, and the amendment was introduced to the members of the Congress in those terms. If Congress's original purpose was secular, and as to that there seems no doubt, its clarification of that purpose can hardly have been other than secular.

b. *No primary effect of the statutory requirement advances or inhibits religion.*

The effect of eliminating practices that disadvantage persons of various religious persuasions is not one that advances or inhibits religion. The promotion of equal employment opportunities is secular, and it is the main effect of the reasonable accommodation provision. If the test of primary effect meant discovery of principal effect, the inquiry would be at an end, but the majority in *Nyquist,* over Justice White's dissent (413 U.S. at 823), indicated that a religious effect might be "primary" even if it were concluded that it did not predominate over secular effects. 413 U.S. at 783-84, n.39.

The effect that petitioners assert most strongly to be impermissibly religious is the advancement of the religions whose members will benefit from reasonable accommodation. We explain below why such an effect, were it a primary effect, could not be classed as unacceptably religious in this context, but even if petitioners are right about that point, their argument fails. The elimination of any practice that otherwise would discriminate against members of a particular group does, by definition, help members of that group, and in that sense helps the group itself. Surely that degree of "aid" to religious groups cannot be a primary nonsecular effect, for if it is, no ban on intentional religious discrimination is valid. The Court in *Nyquist*

acknowledged that effects advancing religion are acceptable if they are not direct and immediate. If the effect of aiding a religious group by barring discrimination against members is not itself permissibly secular, it must be indirect and remote. *See McGowan v. Maryland,* 366 U.S. 420, 450 (1961).

A ban on religious discrimination also provides "aid" in another sense. Since one's religion, unlike one's sex or race, is a matter of choice, effective penalties on certain forms of religious exercise will deter some persons, who would otherwise do so, from engaging in those forms of religious exercise, just as penalties for particular forms of political association will deter those forms of association. *See, e.g., Shelton v. Tucker,* 364 U.S. 479 (1960). It is, therefore, inevitable that relief from disadvantages otherwise attached to membership in a religious group will "aid" that group in the sense of removing one kind of barrier (though not a controlling one for most individuals) to membership and active participation. It is apparently this effect that petitioners urge is impermissible.

But if this effect is not, as we believe, permissibly secular, neither is it direct and immediate. It is the inevitable and incidental effect of equalizing opportunity for members of a group previously discriminated against when persons can by choice leave or enter the group. In this connection, it matters not whether intentional religious discrimination or practices that discriminate in effect are eliminated. Termination of previous intentional discrimination also removes a barrier to membership in the group previously suffering discrimination. If the incidental effect of "aiding" certain religious groups were to invalidate the reasonable accommodation requirement, it would also invali-

date a simple ban on intentional religious discrimination, for the effect, and its degree of immediacy and directness, is precisely the same. The unquestioned validity of a ban on intentional discrimination merely buttresses a conclusion that is otherwise apparent, that the incidental removal of one barrier to active involvement in certain religious groups may permissibly accompany the primary effect of elimination of employment practices that impose unequal burdens.[8]

c. *Even if relief of burdens on religious exercise is regarded as the purpose or a primary effect of the statutory requirement, the requirement is constitutional because this form of relief represents permissible accommodation under the Free Exercise Clause.*

Thus far, we have assumed that the purpose of relieving religious persons of burdens on their exercise of religion is not itself an appropriate secular purpose under the *Nyquist* test and that the effect of relieving such burdens would not be an appropriate effect were it a primary one. But this assumption is mistaken. Even were these the main purpose and effect, the reasonable accommodation requirement would be consti-

[8] It is argued by petitioners that reasonable accommodation requires an employer to support the religion of employees to whom he accommodates, and this might be urged to be a primary effect that is not secular. The answer is that, as we have shown above, the employer does not support anyone's religion in a constitutionally significant sense. The minimal adjustments in schedule he must make are secular effects, not proscribed religious ones.

tutional. The reason is that in some settings, including this one, it is undoubtedly a constitutionally permissible purpose and effect to relieve burdens on the free exercise of religion. In *Braunfeld v. Brown,* 366 U.S. 599 (1961), this Court clearly indicated the appropriateness of exemptions from Sunday Closing laws based on religious grounds, calling such exemptions perhaps the "wiser solution" to the burden placed on Sabbatarians, 366 U.S. at 608. There was no question that the main purpose and effect of those exemptions was to relieve burdens on the exercise of religion. In *Sherbert v. Verner,* 374 U.S. 398 (1963), this Court indicated that a state must treat a person as willing to accept suitable work for purposes of unemployment compensation even if the person refuses to work on Saturday for religious reasons, although the state was free to treat any other person who refused to work on Saturday as not willing to accept suitable work. Again, the reason was that burdens on religious exercise could appropriately be relieved, the difference from *Braunfeld* being that in this instance a majority of seven held that such relief was constitutionally compelled by the Free Exercise Clause. In the conscientious objector cases, the appropriateness of relief of burdens on religious exercise also was recognized, *see, e.g., Gillette v. United States,* 401 U.S. 437 (1971); and in *Wisconsin v. Yoder,* 406 U.S. 205 (1972), this Court again held that an exemption from school attendance requirements for the Amish was not only allowable but compelled by the Free Exercise Clause.

Since it is evident that in all these instances the main purpose and effect of constitutionally allowable or constitutionally compelled accommodations were to relieve burdens on religious exercise, it is obvious that these

purposes and effects must be acceptable within the meaning of the *Nyquist* test if that test is truly of general applicability to establishment issues. The only alternative is to conclude that the test is not one of general application and does not reach cases of constitutionally permissible accommodation to religion.

Even cursory analysis of *Sherbert v. Verner,* 374 U.S. 398 (1963), demonstrates that in this context the purpose and effect of relieving burdens on religious exercise is contitutionally permissible. In that case seven justices held that a state must not deny unemployment benefits to someone who refused Saturday work for religious reasons, and all nine justices agreed that a state might make that choice. It would be anomalous to hold that a government must or may pay unemployment compensation to persons unwilling to work on Saturday and then to decide that the government as an employer may not make any adjustments in its own work schedule to allow such persons to work in government jobs that ordinarily involve Saturday work. Thus it may be concluded that when the government as employer provides for reasonable accommodation, as the federal government has done, *see* 5 C.F.R. § 713.204(g), that action is very likely constitutionally compelled under the Free Exercise Clause and is certainly constitutionally permissible. *Cf. Zorach v. Clauson,* 343 U.S. 306 (1952).

In terms of purpose and effect, the relief of burdens on free exercise is precisely the same whether government officers are directed to accommodate or private employers. Whatever differences there may be between the two laws, they do not lie in the impact on religious exercise of affected employees. Thus, *Sherbert v. Verner,* 374 U.S. 398 (1963), clearly establishes the appropriateness of relieving burdens on the exercise of reli-

gion in this context, and shows that a purpose and effect attack must fail even if, contrary to fact, this purpose or effect were deemed primary. Either permissible free exercise accommodations, such as this one, may constitute nonreligious purposes and effects within the meaning of *Nyquist* or that test is inapplicable to cases involving permissible accommodation.

Petitioners suggest that government regulation of private employers makes this case different for constitutional purposes from those involving governmental practices themselves; petitioners do not explain why this difference is of any constitutional significance. Certainly the Establishment Clause must be interpreted in light of free exercise values, whether government activities or private activities are regulated, and whether the Free Exercise Clause is itself a source of legislative power, as in this case, or the First Amendment stands only as a limit on the exercise of some other power. The religion provisions of the First Amendment are interpreted as a unity; thus the interplay of "no establishment" and "free exercise" values is essentially the same whether government or private action is the object of legislation.

There is no sensible basis for suggesting that the government may make reasonable accommodations to its own employees but cannot require employers affecting commerce to do the same. We have demonstrated that the purpose and effect on employees will be the same in both instances and that reasonable accommodation neither infringes the religious liberty of employers nor compels them to support any religion. As indicated in the next section, the government's entanglement with religion is actually less when it regulates

private employment than when it deals with its own employees.

d. *Reasonable accommodation does not produce excessive entanglement of government with religion.*

Under the *Nyquist* test, a law must not result in excessive entanglement of government with religion. Reasonable accommodation does require employers to respond to claims of religious need and to make appropriate adjustments. The government, through the EEOC and the courts, is ultimately responsible for resolving disputes over whether a claim of need suffices and the duty to accommodate has not been met. But this is hardly an excessive entanglement.

Most actual disputes have turned on the degree of hardship which the employer must undertake to make an accommodation; that issue does not entangle the government with religious issues at all since it concerns only how much inconvenience the employer must bear under the statute. In theory, at least, the government must also stand ready to decide if a claim of religious need is sincere and to determine if a claim for accommodation is "religious" within the statutory meaning. There will rarely be any doubt whether a claim is religious. Since religious need in this context includes the needs of nonbelievers in respect to religion, the definition of religion will not involve government scrutiny of whether an individual or group meets some narrow standard of religion. Finally, since accommodation is meant to equalize the position of employees, not to put those with religious needs in a superior position, the likelihood of fraudulent claims is remote. If the courts are ever called on to estimate

sincerity, they can do so without entangling themselves in religious doctrine.

As this Court has often recognized, *see Walz v. Tax Commission,* 397 U.S. 664 (1970), complete noninvolvement of government with religion is impossible; all that is demanded is neutrality and the avoidance of excessive entanglement. When this Court has spoken of such entanglement, it has envisioned continual government monitoring of the activities of religious institutions. *See Lemon v. Kurtzman,* 403 U.S. 602 (1971). No such monitoring is required by this statute.

Indeed the degree of government involvement with religion will almost certainly be markedly less than was required to administer the conscientious objector program. Not only did the selective service system and the courts have to define religion and draw the line between general and selective objectors in difficult cases, *see, e.g., Sicurella v. United States,* 348 U.S. 385 (1955), they had to deal with many, many cases in which sincerity was a crucial issue, since the exemption was desired strongly enough by large numbers of persons who did not qualify for it to induce them to deception. Although there may be more employees covered by Title VII than there were men processed by the Selective Service System, it seems extraordinarily unlikely that there will be so many perplexing disputes over sincerity and religious belief. Moreover, the very inquiries involved here must also be made by governments when they administer religious exemptions to Sunday Closing laws, apply the rule of *Sherbert v. Verner,* or make accommodations to work schedules to their own employees-all clearly constitutional practices. Indeed in all those instances, the need for government determination of what is religious and who is

sincere is likely to be proportionally more frequent, since government deals directly with religious claimants rather than merely reviewing unresolved disputes between such claimants and their employers, as under this statute. In sum, the reasonable accommodation required by the statute does not necessitate excessive entanglement of government with religion.

Nor does required accommodation threaten the political divisiveness along religious lines that has concerned the court in many of its discussions of entanglement, *see, e.g., Walz v. Tax Commission,* 397 U.S. 664 (1970); *Lemon v. Kurtzman,* 403 U.S. 602 (1971), *Committee for Public Education v. Nyquist,* 413 U.S. 756 (1973), and which emerges as the predominant constitutional concern in Mr. Justice Brennan's concurring and dissenting opinion in *Meek v. Pittinger,* 421 U.S. 349, 373 (1975). In its long-term general effect, reasonable accommodation should reduce the divisive economic and political struggles along religious lines that the Court properly regards as a matter of great concern under the First Amendment. Rigid work schedules are an invitation to members of minority religions to organize and pressure employers for alterations or adjustments. Such pressure may be resisted by dominant religious groups whose members may perceive some benefits for themselves in the impossibility that those of minority faiths can fill particular jobs. No doubt, reasonable accommodation occasionally causes individual resentment over concessions made to employees with special religious claims. It is highly doubtful whether such resentment could lead to potential divisiveness in the relevant social and political sense; in any event, reasonable accommodation removes a much more significant source

of divisiveness by largely eliminating differing religious needs as practical determinants of employment opportunity.

II

TWA Failed To Fulfill Its Statutory Duty To Make A Reasonable Accommodation To Hardison's Religious Needs.

A. The 1967 Regulation Requiring Reasonable Accommodation Accurately Reflects Congress' Intent in Enacting Section 703(a)(1) of the Civil Rights Act of 1964.

The 1964 Civil Rights Act forbids employers from discriminating on the basis of religion in respect to hiring, discharges, and conditions and privileges of employment. 42 U.S.C. § 2000e-2(a)(1) (1974). A 1967 regulation of the Equal Employment Opportunities Commission stated that the Act places "an obligation on the part of the employers to make reasonable accommodation to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business." 29 C.F.R. § 1605.1 (1975). Under the Commission regulation, "the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable." *Ibid.*

As both lower courts in this case and virtually all other courts passing on the issue have held,[9] the regulation reflects Congress's intent in passing the 1964 Act. The reasonable accommodation requirement is needed to make effective the ban on religious discrimination. In addition, the interpretation of the agency responsible for administering the Act is entitled to considerable deference. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971). Furthermore, the reasonable accommodation requirement in respect to religious discrimination accords with this Court's unanimous view of what Congress provided for racial discrimination. *Griggs v. Duke Power Co., supra.* Finally, Congress has indicated unequivocally its view that the Commission had properly interpreted the Act. In response to judicial uncertainty, an amendment was proposed in 1972 that adopted almost verbatim the crucial language of the EEOC regulation. Sponsoring the amendment, Senator Randolph made it clear that the amendment merely clarified the original intention of the Civil Rights Act. 118 Cong. Rec. 705-06 (1972). The amend-

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[9] For the court of appeals cases on this point, *see Cooper* v. *General Dynamics, Convair Aerospace Div.*, 533 F.2d 163 (5th Cir. 1976); *Williams v. Southern Union Gas Co.*, 529 F.2d 483 (10th Cir. 1976), *cert. denied*, 97 S. Ct. 381 (1976); *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515 (6th Cir. 1976); *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), *aff'd per curiam by an equally divided court*, 97 S. Ct. 342 (1976); *Young v. Southwestern Savings & Loan Ass'n.*, 509 F.2d 140 (5th Cir. 1975); *Yott v. N. American Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974); *Reid v. Memphis Publishing Co.*, 468 F.2d 346 (6th Cir. 1972); *Riley v. Bendix Corp.*, 464 F.2d 1113 (5th Cir. 1972). *But see, Reid v. Memphis Publishing Co.*, 521 F.2d 512 (6th Cir. 1975), *cert. denied* (97 S. Ct. 394 (1976); *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970) (dictum), *aff'd per curiam by an equally divided court*, 402 U.S. 689 (1971).

ment was adopted unanimously by both the Senate and the House of Representatives. Given the joint force of these reasons, it is readily apparent that the 1967 regulation should be considered a proper exercise of the authority of the EEOC and an accurate statement of the law governing TWA's behavior in this case.

B. TWA Failed to Make a Reasonable Accommodation to Hardison's Religious Needs and Did Not Prove That Possible Accommodations Would Have Imposed Undue Hardship on the Conduct of Its Business.

The court of appeals properly held that TWA had neither made a reasonable accommodation to Hardison's religious needs nor demonstrated that any accommodations that it might have made would have imposed undue hardship on the conduct of its business. TWA's objections to this aspect of the court of appeals opinion seem to be three: that the court acted improperly in the scope of its review of the district court, that it incorrectly held TWA responsible for not pursuing accommodations that would have been inconsistent with the letter of the collective bargaining agreement, and that, in respect to accommodations consistent with the agreement, it interpreted the statutory requirement to impose greater burdens on employers than were actually intended. None of these objections is well taken.

Before we discuss each objection in turn, we indicate three points that are not disputed in the case and clarify a possible source of confusion about the meaning of "reasonable accommodation." First, despite TWA's statements that Hardison had actually worked on Saturdays in the previous year, and its snide reference to his wife's divorce, petitioner does not deny that Hardison made a sincere religious claim for accommodation and that the courts below were correct in assuming that Hardison's claim triggered the requirement of reasonable accommodation. Second, TWA does not argue that it could have properly discharged Hardison even if it failed to make a required reasonable accommodation. The legitimacy of his discharge unquestionably turns on whether TWA failed to meet a statutory duty that was properly imposed. Third, petitioner does not deny that if the part of the EEOC regulation requiring reasonable accommodation is valid, that part of the regulation is also valid which casts on the employer "the burden of proving that an undue hardship renders the required accommodations . . . unreasonable." That approach is consonant with the analogous treatment of discriminatory hiring practices which must be defended on the ground of "business necessity." *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *Claybaugh v. Pac. N.W. Bell Telephone Co.*, 355 F. Supp. 1, 5 (D. Ore. 1973). In light of the employer's control of information about its own operations, that approach is plainly the only sensible one. TWA does not dispute this; by its silence, it concedes that it bears the burden of proving undue hardship.

The statement by the district court that TWA's efforts constituted "a reasonable accommodation," 375 F. Supp. at 889, poses the possible source of confusion about the meaning of reasonable accommodation. The statutory requirement as reflected in the EEOC regulation demands that an employer "make reasonable accommodations," that is, actually offer to an employee with a valid claim an accommodation that meets his

religious need if a reasonable accommodation exists. *See Claybaugh v. Pac. N.W. Bell Telephone Co.*, 355 F. Supp. 1, 6 (D. Ore. 1973). Hardison never was actually offered any form of relief from the conflict of his religious conscience and his scheduled Sabbath work. At the most, TWA could be said to have acquiesced in the possibility that the union might work out a swap of working times, but that did not amount to offering an accommodation to Hardison. Generally benign motives and a willingness to discuss problems and consider solutions are not themselves a reasonable accommodation, nor can they substitute for one. The best that could be said for TWA's behavior in this case is that it did not display ill will or intransigence, but neither did it offer any actual accommodation to Hardison in respect to Sabbath work nor take any steps to persuade the union to agree to accommodations supposedly varying from the terms of the collective bargaining agreement. The district court considered the actual accommodations that might have satisfied Hardison's religious need not to work on the Sabbath and concluded that each would have imposed undue hardship on TWA. Given the language of the EEOC regulation, a precise statement of the district court's conclusion and of TWA's claim here would be that no reasonable accommodation was required because any actual accommodation would have involved undue hardship. That is how the issue is impliedly cast in the main body of the district court opinion, and it is how the issue is cast in the opinion of the court of appeals, which properly concluded that there were reasonable accommodations available that would not have involved undue hardship for TWA.

1. *The Court of Appeals Acted Within the Proper Range of Its Authority in Reversing the Judgment of the District Court.*

Petitioner's argument that the court of appeals gave Hardison a "trial *de novo*" is so far out of accord with what happened it is difficult to take seriously. The issues as to which that court supplanted the judgment of the district court, *see* 527 F.2d at 39-42, were not ordinary factual issues but legal ones.

One point of difference was the legal effect of the collective bargaining agreement—the district court apparently believing that an employer could not be required to make an accommodation that would have varied from the literal terms of such an agreement, and the court of appeals taking a contrary view. The impact of such an agreement on the employer's statutory duty is indisputably a legal question, indeed a fairly important one in the interpretation of the 1964 Act. Another point of difference was the degree of hardship that the Act demands of the employer. The district court considered the Act less stringent than the court of appeals. The basic issue is what content is to be given the terms "reasonable accommodation" and "undue hardship." This issue is similar to the question of whether a certain state of facts constitutes an "unreasonable search" or an "unreasonable restraint of trade." There has been some confusion in the lower courts about how to characterize this issue, and the court of appeals here did speak of the district court's "findings" as "clearly erroneous," 527 F.2d at 37, but plainly the major questions were not ordinary factual ones. There can be no doubt that an appellate court may review and correct mistaken determinations by

the trial court of how a relevant statutory standard like "reasonable accommodation" or "undue hardship" applies to the facts the trial court has found. A third point of difference was whether TWA had produced sufficient evidence to prove undue hardship. Unquestionably an appellate court acts properly when it decides whether sufficient evidence was produced to lead a trier of fact to a particular conclusion.

The only real "fact" asserted by the court of appeals that is not to be gleaned from the district court's opinion is that the conflict between Hardison's religion and his actual schedule would end when a fellow employee with lower seniority returned from his vacation. Here the court of appeals did not deviate from what the district court said; it tried only to be more specific about what was involved. In any event, that fact is not of crucial importance either for the court of appeals opinion or for this Court's disposition of the case.

2. *TWA's Failure to Pursue Accommodations Which Were Reasonable and Would Not Have Imposed Undue Hardship Constituted a Violation of Its Statutory Duty, Even Though Those Accommodations May Have Varied From the Letter of a Collective Bargaining Agreement.*

The roles of the union and collective bargaining agreements in this statutory scheme present intricate questions that require some discussion. Fortunately, two basic principles and their application to this case can be stated rather simply at the outset. The employer and the union cannot by joint action automatically render "unreasonable" accommodations that would otherwise be eminently reasonable. If such an accommodation appears possible and the employer makes no

serious effort either to implement the accommodation on its own or to get the union to agree to do so, the employer has failed to comply with the statute.

Unions bear responsibility under the Act if they defeat reasonable accommodations between employers and employees; on this point the courts below agreed. A union has a direct duty under the Act not to classify its membership in a way that would adversely affect a person's status as an employee because of his religion. 42 U.S.C. § 2000e-2(c)(2) (1974). Although the reasonable accommodation provision of the EEOC regulation, as well as the 1972 amendment, is phrased in terms of the employer's duty to make a reasonable accommodation, it may well be that a union has a similar duty, since it is similarly barred from discriminating on religious grounds. Whatever debate there may be on this point, *see Cooper v. Gen. Dynamics, Convair Aerospace Div.*, 533 F.2d 163 (5th Cir. 1976), the statute explicitly imposes on the union a duty not "to cause an employer to discriminate" in violation of this section, 42 U.S.C. § 2000e-2(c)(3)(1974), and an employer's failure to make a reasonable accommodation is one kind of statutory violation. Thus, a union is undoubtedly liable under the Act if it causes an employer to fail to make a reasonable accommodation. In this case, the district court's entry of judgment in favor of the union is not under review, so this Court is directly concerned with union responsibility only insofar as it clarifies TWA's responsibility.

If the employer must make reasonable accommodations and the union must allow him to do so, they cannot combine by means of a broad, rigidly formulated, collective bargaining agreement to foreclose reasonable accommodations. "The rights assured by Title VII are

not rights which can be bargained away either by a union, by an employer, or by both acting in concert." *Robinson v. Lorillard Corp.,* 444 F.2d 791, 799 (4th Cir. 1971). Whatever the actual motives may have been in originally making the agreement, the employer and union must either refrain from writing provisions that would render reasonable accommodations unacceptable or they must agree to variances from the agreement when circumstances compel reasonable accommodation. As the court of appeals concluded, "a collective bargaining agreement, the seniority provisions of which preclude *any* reasonable accommodation for religious observances by employees, is *prima facie* evidence of union and employer culpability under the Act." (emphasis in original).

TWA contends that insofar as the collective bargaining agreement prevented otherwise reasonable accommodations to Hardison's religious needs, such as a swap of shifts or days off, it cannot be found guilty of religious discrimination in the absence of discriminatory intent (TWA Br. 47-49). Support for this position is sought in Section 703(h) of the Civil Rights Act of 1964 which provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply * * * different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. * * * 42 U.S.C. § 2000e-2(h) (1974).

But that provision is not applicable to this case. Section 703(h) is merely "directed toward defining what

is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act." *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 761 (1976). In *Franks,* the Court held that a finding of discriminatory purpose was not necessary for a Title VII violation when the underlying legal wrong was effectuated by a racially discriminatory hiring system as opposed to a racially discriminatory seniority system. *Id.* at 757-58. Hardison's claim is similarly based not on a challenge to the existing seniority system but to the religiously discriminatory effects of uniform work rules. The usual standard under Section 703(a)(1) of "discrimination in effect" is applicable to this case, and a showing that TWA's work schedules have a disparate effect on employees whose religious beliefs prevent them from working one day a week is sufficient to establish a *prima facie* case of religious discrimination. *Cf. McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973).

Petitioners attempt to distinguish *Franks* by claiming that the seniority system did not "lock in" a pattern of past discrimination (TWA Br. 48, 49 n.32, Union Br. 34-35). In this case, however, the seniority system not only locked in past discrimination but constituted a significant source of present discrimination. From their very inception, the seniority provisions of the collective bargaining agreement have discriminated in effect against prospective employees of certain religions and they continue to do so. One consequence of the collective bargaining agreement is that, in all instances, employees with the lowest seniority work weekends. Thus, TWA has not hired individuals

whose religious beliefs prevent them from working on Saturday or Sunday, and many individuals with such beliefs have undoubtedly been dissuaded even from applying for jobs at the overhaul base.

Petitioners maintain that, as a matter of law, an employer is not required to make an accommodation—no matter how simple—which in any way violates the provisions of a collective bargaining agreement. The underlying assumption of this position is that seniority and other expectations created by a collective agreement are indefeasible "vested rights," not subject to modification by law. However, the decisions of this Court unquestionably establish that "employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public interest." *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 778 (1976); *See also Tilton v. Missouri Pac. R. Co.,* 376 U.S. 169 (1964); *Ford Motor Co. v. Hoffman* 345 U.S. 330 (1953); *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275 (1946). The policy of nondiscrimination underlying Title VII is of the "highest priority" *Franks, supra* at 763, 779; *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 47 (1974); *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968). As the decision in *Franks* demonstrates, contractual expectations may be abrogated in order to further the policy against religious discrimination.

Despite petitioner's contention to the contrary, there is no doubt that Congress expected the reasonable accommodation requirement to override provisions of collective bargaining agreements that would block accommodations. In explaining the need for the reasonable accommodation amendment to Title VII, Senator Randolph noted that though Congress had intended to require reasonable accommodation in the original Act, "court decisions have clouded the matter with some uncertainty." 118 Cong. Rec. 705-06 (1972). Senator Randolph placed in the Congressional Record the decisions in *Dewey v. Reynolds Metals Co.,* 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam by an equally divided court,* 402 U.S. 689 (1971), and *Riley* v. *Bendix Corp.,* 330 F. Supp. 583 (M.D. Fla. 1971)—both cases in which the court concluded that the employer was not required to accommodate his employee's religious needs because a collective bargaining agreement required all employees to be available for work on weekends. Congress made clear in the 1972 amendment its intention to require reasonable accommodation in situations like those in *Dewey* and *Riley.* Therefore, an employer must make a reasonable accommodation even if that action will violate a collective bargaining agreement, unless he can prove that such an accommodation will impose undue hardship on the conduct of his business.

The inflexibility of a collective bargaining agreement must be justified by substantial business necessity. *See* EEOC Dec. No. 72-2066, 4 FEP Cases 1963, 1973 CCH EEOC Decisions ¶ 6367 at 4668. TWA offers two justifications for its failure to undertake accommodations which violated the provisions of the collective bargaining agreement: 1) that had TWA arranged a swap of days off or shifts without union consent, it "could face employee morale and grievance problems" (TWA Br. 19, 58), and 2) that if TWA had to accommodate all its employees religious beliefs, "it would become impossible to schedule work" (TWA Br. 19, 59). As the court of appeals held, TWA did not produce sufficient evidence to prove that these possibilities would impose undue hardship.

TWA could have taken steps to make an accommodation without union approval. As Mr. Kussman testified, the union had no power to veto management actions (A. 148). Though no evidence of union pressure was submitted in this case, avoidance of union pressure would not constitute "a legitimate business purpose" which can justify the failure to make a reasonable accommodation. *Cf. Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 (1971). The possibility of employee grievances is an equally insufficient ground for demonstrating "business necessity" or "undue hardship." Moreover, if this Court clearly establishes that an employer must make a reasonable accommodation even if that accommodation entails action which violates a collective bargaining agreement, then employees will have no basis for filing grievances against their employees when such accommodations are made.

The mere possibility of employee morale problems cannot defeat the reasonable accommodation requirement. As this Court pointed out in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 775 (1976):

> If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed. *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 663 (2d Cir. 1971).

If employee discontent becomes so pervasive that it adversely affects the employer's business, then a showing of undue hardship may be possible. A number of courts and the EEOC have required the employer to "make a persuasive showing that employee discontent will produce 'chaotic personnel problems.'" *Cummins*

v. Parker Seal Co., 516 F.2d 544, 550 (6th Cir. 1975), *aff'd per curiam by an equally divided court*, 97 S. Ct. 342 (1976); *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 521 (6th Cir., 1976),; EEOC Dec. 72-0606, CCH EEOC Dec. ¶6310, at 4555. One court has adopted a more lenient standard, requiring the employer to demonstrate that a "serious morale problem" would result. *Reid v. Memphis Publishing Co.*, 521 F.2d 512, 516 (6th Cir. 1975), *cert. denied*, 97 S. Ct. 394 (1976). Under either standard as applied to this case, TWA has failed to satisfy its burden of proof. Hardison's problem was the first instance at the Stores Department in which an employee's religious conscience prevented him from performing assigned work duty (A. 140-41, 151). Thus, TWA has no basis in experience to support its contention that other employees would object to its accommodating Hardison's religious practices (A. 164) and has produced no concrete evidence that employee resentment would be an unmanageable problem.

TWA's claim that "chaos" would result "if all religious beliefs were accommodated" (TWA Br. 15, 59) is unsupported by any evidence. The record clearly establishes that Hardison was the only employee whose religious needs had to be accommodated (A. 140-41). No evidence was produced about other employees who would have conflicts between work schedules and religious needs or that such conflicts, if they existed, could not be comfortably accommodated. Of course, the mere hypothetical possibility, unbased in actual experience, that some employees might fabricate claims of religious need cannot provide a basis for refusing to accommodate a concededly valid claim.

Thus far we have argued that an employer and union both bear responsibility under the Act when a collec-

tive bargaining agreement is interpreted to bar reasonable accommodation. But even if there were some doubt as to whether an employer must ignore the terms of an agreement and union resistance to a variance, TWA failed to make a reasonable accommodation in this case. Together employers and unions can undoubtedly agree to variances from the terms of the collective bargaining agreement; these are within the general framework of relations covered by a collective bargaining agreement. TWA made no serious effort to get the union to agree to a variance, even though a number of variances would not seem to have posed any substantial interference with employee expectations.

TWA could have referred Hardison to the Union Relief Committee, an informal organization which worked out solutions to seniority problems in special situations (A. 130). Though the committee was run by the union, and not by TWA (A. 121), TWA did not even inform Hardison of his right to resort to the committee. Hardison testified that no one ever explained to him what the Union Relief Committee was (A. 79, 97). Though the committee generally dealt with temporary problems, the record indicates that when health or family matters were involved, TWA and the union approved permanent arrangements to allow changes in shifts or days off (A. 131, 139, 144-45). Moreover, as the court of appeals found and as we have argued, the problem of accommodating was likely not to have lasted longer than 90 days and was thus likely to be no longer in duration than problems typically handled by the Committee (A. 144). Had TWA encouraged the Union Relief Committee to do so, the Committee might well have agreed to recommend that

Hardison's religious need be treated like the special family problems it usually considered.

If TWA had urged the union to agree, the union might have accepted a voluntary swap in shifts that would have interfered with no serious expectancies. It is even possible a swap could have taken place without the slightest breach in the rigid system of seniority assignment. Hardison had told Kussman that an employee on the "graveyard" shift was willing to swap shifts with him. If no one more senior than Hardison wanted the "graveyard" shift and no one more senior than that employee wanted Hardison's shift, the swap would have been entirely consistent with seniority assignment system. But no inquiries were made to see if more senior employees wished to bid into these shifts. At the very least, the employer's duty to make a reasonable accommodation requires it to explore possibilities of accommodation with the union and to request variances from the collective bargaining agreement when they would not defeat significant expectations. Although TWA did not express opposition to a voluntary swap, neither did it in any way encourage the union to agree to such a swap.

TWA seems to imply that by moving from Building No. 1, where he had higher seniority, Hardison may have sacrificed rights to accommodation he would otherwise have had. That suggestion is plainly fallacious. Hardison moved for understandable family reasons. One purpose of the reasonable accommodation requirement is to allow employees with special religious needs to improve their employment conditions in the same manner as other employees; that is all Hardison sought to do. If accommodation would be required to a completely new employee with low seniority, plainly it cannot be withheld from Hardison because he was previ-

ously a TWA employee with higher seniority on a different job.

3. *TWA Failed to Make Accommodations Consistent with the Collective Bargaining Agreement That Were Reasonable and Were Not Shown to Involve Undue Hardship.*

There were at least two accommodations that TWA might have made without any variance in the collective bargaining agreement. TWA could have paid another employee overtime rates to cover Hardison's position, or it could have managed with one fewer than the full complement of employees during that period.

It is undisputed that the collective bargaining agreement permitted TWA to fill Hardison's job with an employee who volunteered to do overtime work. Even if it is assumed that Hardison's dilemma was not limited to a few weeks, TWA could have managed to pay overtime for one shift per week when necessary until Hardison had enough seniority to avoid any Sabbath work. If TWA had made an initial accommodation and Hardison had continued to work on the day shift, it is apparent that he would not have needed to work most Saturdays, because he had not been required to do Saturday work before his fellow employee with lower seniority went on vacation. Since Hardison had within two years of being hired acquired enough seniority at Building No. 1 to avoid Saturday work altogether, it is reasonable to assume that within a similar period he would have had enough seniority at Building No. 2 to avoid Saturday work.

By the time of his discharge, Hardison had transferred to the twilight shift which involved Friday afternoon and evening work but allowed him to have

Saturday off. Thus, he was able to work the first part of that shift himself. Moreover, Hardison testified that he intended to return to Building No. 1, where he would have acquired his old level of seniority, and that such a transfer would have been possible within a few months (A. 70-71, 110-11). However the matter is viewed, TWA would have had to pay overtime only temporarily. Although the payment of overtime undoubtedly imposes a cost on the employer, the maximum amount of overtime pay required in this case had TWA made the accommodation to Hardison's religious needs would hardly have imposed the sort of substantial cost that might constitute undue hardship on the conduct of TWA's business within the meaning of the EEOC regulation. *Ward v. Allegheny Ludlum Steel Corp.*, 397 F. Supp. 375 (W.D. Pa. 1975).

TWA argues that had it tried to rely on voluntary overtime work, it might not have been assured of finding someone to do Hardison's job (TWA Br. 54). It seems probable that some of the more than 200 employees capable of doing Hardison's job would have wished to work overtime on an occasional or regular basis, yet no inquiries were made to ascertain possible interest; nor did TWA provide concrete evidence to show that reliance on such a volunteer was unlikely to produce willing workers or would be unsatisfactory for some other reason. It has thus fallen far short of its burden of showing that reliance on volunteer overtime workers would have imposed undue hardship on the conduct of its business.

As far as the possibility of working shorthanded during all or part of Hardison's shift, it is not disputed that TWA could have managed to have his job done. But two witnesses asserted that there would be a cost

in other job functions (A. 125, 146). The court of appeals correctly concluded that this testimony did not satisfy the company's burden of showing "undue hardship." Since it is not the law that every inconvenience is "undue hardship," *see, e.g., Cummins v. Parker Seal Co.,* 516 F.2d 544 (6th Cir., 1975), an employer must explain with some specificity exactly what sacrifice a particular accommodation would involve. Otherwise, the trier of fact is in no position to assess the degree of hardship. This is precisely the situation in this case. Such statements about other job functions hardly leave a court in a position to assess whether the inconveniences will be slight or grave. TWA was required to provide more detailed information about its operations before a court could properly conclude that being shorthanded one man for a part of one shift one day per week would impose "undue hardship." In this case, it should have been particularly easy for TWA to have provided more detailed information. After all, Hardison had actually missed three Saturdays in a row and one Friday evening. Arrangements were made to cover his position (A. 142, 162). TWA could have demonstrated precisely what adjustments had been made and why their continuation would have constituted undue hardship. Its failure to do so left it far from satisfying its burden of proving that use of a supervisor or another employee to perform Hardison's work would create undue hardship in the conduct of its business.

* * * *

In summary, TWA's position is that accommodations involving any employer cost *per se* constitute "undue hardship" and that all possible cost free accommodations were barred by the collective bargaining agreement. It must succeed on both arguments to win

the case, for if either argument is wrong, TWA improperly failed to make a reasonable accommodation. Adoption of TWA's interpretation of the reasonable accommodation requirement would turn that requirement almost into a dead letter, since the slightest business inconvenience or potential difficulty with a union would automatically amount to undue hardship. Since the requirement is a substantial one, intended to have a real effect on religious discrimination and unequal employment opportunities, TWA's interpretation of its content is wholly unacceptable. Under any proper reading of the requirement, this is not a borderline case but an obvious case. TWA failed to meet its statutory obligation.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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